Vol. 44 (2d Series) DECEMBER 21, 1973 No. 1

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(44 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 44 (2d Series)

Pages 1 to 244

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

ROBERT E. LEE
H. REX LEE
CHARLOTTE T. REID
RICHARD E. WILEY
BENJAMIN L. HOOKS

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - on a subscription basis

INDEX

	Page
Big Valley Cablevision, Inc.; file No. CAC–1345 (F.C.C. 73–1244)	1
Big Valley Cablevision, Inc.; file No. CAC–278 (F.C.C. 73–1245)	3
Business Radio Service—Identification; RM–1654 (F.C.C. 73–1266)	5
Cable Video, Inc.; file No. CAC–1133, et al. (F.C.C. 73–1247)	7
Emergency Medical Services; docket No. 19880 (F.C.C. 73–1238)	9
Fairness Doctrine Ruling; re complaint by Dr. Benjamin Spock and The Peoples' Party against ABC, CBS, and NBC (F.C.C. 73–1257)	12
Fairness Doctrine Ruling; re complaint by John L. Scherer, Jr. against Station KSTP–TV	21
Fairness Doctrine Ruling; re complaint by Jearl B. Nunnelee, Superintendent, Huerfano School against Station KFLJ	26
5 KW, Inc., et al.; docket No. 19218 et al. (F.C.C. 73R–394)	30
FM Table of Assignments; docket No. 19550 (F.C.C. 73–1252)	32
General Electric Co.; re request for waiver of the all-channel television tuning rules (F.C.C. 73–1159)	34
Greater Indianapolis Broadcasting Co., Inc.; notice of apparent liability for forfeiture (F.C.C. 73–1260)	37
ITT World Communications, Inc., et al.; docket No. 19344 (F.C.C. 73R–400)	41
Howell, Jimmie H. et al.; docket No. 19882 et al. (F.C.C. 73–1249)	43
Lake Telephone Co.; file No. CAC–869 (F.C.C. 73–1243)	45
Olson, Roger D.; file No. BPFT–96 (F.C.C. 73–1279)	47
Peninsula Broadcasting Corp.; file No. CSR–377(X) (F.C.C. 73–1289)	49
Radio New Jersey; docket No. 18252 (F.C.C. 73R–405)	51
Radio New Jersey; docket No. 18252 (F.C.C. 72D–58)	60
Rippe, Herbert L.; docket No. 19270 (F.C.C. 73R–404)	91
Rippe, Herbert L.; docket No. 19270 (F.C.C. 72D–61)	100
RKO General, Inc., et al.; docket No. 16679 et al. (F.C.C. 73–1263)	123
RKO General, Inc., et al.; docket No. 16679 et al. (F.C.C. 69D–43)	149
Thoms Broadcasting Cos., Inc., The; file No. CSR–350(X) (F.C.C. 73–1290)	230
Valley Cable Vision, Inc.; file No. CAC–115 et al. (F.C.C. 73–1246)	232
Western Union International, Inc.; re proposed rates for leased channel service between Honolulu and Hong Kong (F.C.C. 73–1272)	236
WWKY, Inc., et al.; docket No. 19748 et al. (F.C.C. 73R–401)	239

F.C.C. 73-1244

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BIG VALLEY CABLEVISION, INC. STOCKTON, CALIF. For Certificate of Compliance	CAC-1345, CA482

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On May 29, 1973, Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV, Sacramento, California, and KLOC Broadcasting Company, Inc., licensee of Station KLOC-TV, Modesto, California, filed petitions for reconsideration directed against the Commission's decision in *Big Valley Cablevision, Inc.*, FCC 73-414, 40 FCC 2d 662, which authorized the operation of a cable television system at Stockton, California (located in the 25th television market). These petitions are opposed by Big Valley Cablevision, Inc., and KLOC Broadcasting has replied.

2. Great Western and KLOC both object to Big Valley's carriage of Station KEMO-TV (foreign language), San Francisco, California.[1] In its petition, KLOC objects to the carriage of KEMO-TV on the grounds that such carriage would have a serious economic impact on Station KLOC-TV, which broadcasts virtually all spanish language programming from 5 p.m. to sign-off (there are a few small segments of Portuguese language programming). In support of its argument, KLOC notes that both stations are affiliated with the Spanish International Network and will therefore broadcast many of the same Spanish language programs. Furthermore, KLOC argues that it is a struggling UHF station which has incurred continual annual losses since its inception.

3. The financial data submitted by KLOC which is supported by an affidavit supplied by Mr. Chester A. Smith, president of KLOC Broadcasting Company, Inc., has persuaded us that special circumstances exist which warrant reconsideration of our decision to permit Big Valley's carriage of Station KEMO-TV. As we noted in Paragraph

[1] Great Western's objection is based on its desire to restrict Big Valley's carriage of KEMO-TV to foreign language programs. Since we are prohibiting carriage of KEMO-TV, it is unnecessary to respond to Great Western's argument.

104-019—74——1

96 of the *Cable Television Report and Order*, 36 FCC 2d 143, 180 (1972):

> Where there is a local station broadcasting predominantly in a foreign language, the added diversity provided by the carriage of distant foreign language stations broadcasting in the same language will be permitted unless the local station demonstrates that such importation will adversely affect its ability to serve the public.

We further clarified the type of showing necessary to obtain relief in Paragraph 23 of the *Reconsideration*, 36 FCC 2d 326, where we indicated we would grant special relief pursuant to Section 76.7 of the Commission's Rules only in unusual circumstances where the station made a compelling demonstration. In this case, we are faced with an extremely vulnerable UHF station that has suffered continuing losses. However, since adopting an extensive Spanish language format, KLOC's losses have decreased, and perhaps it has discovered the formula for survival. We believe, based on the information supplied by KLOC, that this hope for survival could be destroyed by the carriage of another Spanish language station, particularly since both stations are affiliated with the Spanish International Network and carry many of the same programs, although at different times.

In view of the foregoing, the Commission finds that reconsideration of the grant of a certificate of compliance to Big Valley Cablevision, Inc., (CAC–1345) with respect to carriage of Station KEMO–TV would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition For Reconsideration" filed May 29, 1973, by Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV, Sacramento, California, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed May 29, 1973, by KLOC Broadcasting Company, Inc., licensee of Broadcast Station KLOC–TV, Modesto, California, IS GRANTED, and an appropriate certificate of compliance will be issued, which deletes carriage of Station KEMO–TV.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 73-1245

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BIG VALLEY CABLEVISION, INC., SAN JOAQUIN COUNTY, CALIF. For Certificate of Compliance	CAC-278, CA430

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On March 26, 1973, KLOC Broadcasting Company, licensee of Station KLOC-TV, Modesto, California, and Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV, Sacramento, California, each filed a petition for reconsideration of the Commission's action in *Big Valley Cablevision, Inc.*, FCC 73-187, 39 FCC 2d 642, which granted a certificate of compliance to Big Valley Cablevision, Inc., to operate a cable television system in certain unincorporated areas of San Joaquin County, California. The petitions are opposed by Big Valley Cablevision, Inc., and KLOC Broadcasting has replied.

2. Great Western and KLOC both object to Big Valley's carriage of Station KEMO-TV (foreign language), San Francisco, California.[1] In its petition, KLOC objects to the carriage of KEMO-TV on the grounds that such carriage would have a serious economic impact on Station KLOC-TV, which broadcasts virtually all Spanish language programming from 5 p.m. to sign-off (there are a few small segments of Portuguese language programming). In support of its argument, KLOC notes that both stations are affiliated with the Spanish International Network and will therefore broadcast many of the same Spanish language programs. Furthermore, KLOC argues that it is a struggling UHF station which has incurred continual annual losses since its inception.

3. The financial data submitted by KLOC which is supported by an affidavit supplied by Mr. Chester A. Smith, president of KLOC Broadcasting Company, has persuaded us that special circumstances exist which warrant reconsideration of our decision to permit Big Valley's carriage of Station KEMO-TV. As we noted in Paragraph

[1] Great Western's objection is based on its desire to restrict Big Valley's carriage of KEMO-TV to foreign language programs. Since we are prohibiting carriage of KEMO-TV, it is unnecessary to respond to Great Western's argument.

96 of the *Cable Television Report and Order*, 36 FCC 2d 143, 180 (1972):

> **Where there is a local station broadcasting predominantly in a foreign language, the added diversity provided by the carriage of distant foreign language stations broadcasting in the same language will be permitted unless the local station demonstrates that such imporation will adversely affect its ability to serve the public.**

We further clarified the type of showing necessary to obtain relief in Paragraph 23 of the *Reconsideration*, 36 FCC 2d 326, where we indicated we would grant special relief pursuant to Section 76.7 of the Commission's Rules only in unusual circumstances where the station made a compelling demonstration. In this case, we are faced with an extremely vulnerable UHF station that has suffered continuing losses. However, since adopting an extensive Spanish language format, KLOC's losses have decreased, and perhaps it has discovered the formula for survival. We believe, based on the information supplied by KLOC, that this hope for survial could be destroyed by the carriage of another Spanish language station, particularly since both stations are affiliated with the Spanish International Network and carry many of the same programs, although at different times.

In view of the foregoing, the Commission finds that reconsideration of the grant of a certificate of compliance to Big Valley Cablevision, Inc., (CAC–278), with respect to carriage of Station KEMO–TV, would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition For Reconsideration" filed March 26, 1973, by Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV, Sacramento, California, IS DIMISSED.

IT IS FURTHER ORDERED, That the "Petition For Reconsideration" filed March 26, 1973, by KLOC Broadcasting Company, licensee of Station KLOC–TV, Modesto, California, IS GRANTED, and an appropriate certificate of compliance will be issued, which deletes carriage of Station KEMO–TV.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 37-1266

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 91 OF THE COMMISSION'S RULES AND REGULATIONS TO PERMIT ADDITIONAL MODES OF IDENTIFICATION IN THE BUSINESS RADIO SERVICE	RM-1654

MEMORANDUM OPINION AND ORDER

Adopted December 5, 1973; Released December 11, 1973

BY THE COMMISSION:

1. Aeronautical Radio Inc. (ARINC) has petitioned the Commission to amend Parts 2 and 91 of the Rules to permit base stations authorized in the Business Radio Service 450–470 MHz band to substitute the name of the licensee, or a recognized abbreviation thereof, for the transmission of its assigned call sign as is now required by Section 91.152.[1] As a corollary to this amendment, ARINC proposes that associated mobile stations be permitted to transmit the base station identifier plus some unit designator.

2. As an alternative, ARINC requests that should the Commission determine that it is not in the public interest to permit identification of all stations in the Business Radio Service in the manner described above, that at least those licensees in the band which employ air terminal use frequencies[2] should be so authorized.

3. In support of its request, the petitioner argues that adoption of the proposal will permit "significant efficiencies" to be realized by "facilitating identification of transmissions" and by "conserving valuable circuit time now consumed in reciting long call signs."

4. We have carefully considered the petitioner's requests and the supporting arguments, and we have concluded that the public interest will not be served by the adoption of these proposals. Petitioner's argument that valuable "circuit time" will be conserved is not persuasive. The recitation of a station's call sign is neither significantly time consuming nor burdensome. Furthermore, the transmission of the entire name of the licensee, sufficient for ready identification, is likely to take at least as long as a statement of the station's call signs. Moreover, identification of a particular station by its call signs facilitates the

---

[1] The proposed amendment reads:
In lieu of the requirements of paragraph (a) of this section, base stations in the Business Radio Service operating in the 450–470 MHz band may use the name of the licensee or a recognized abbreviation thereof, or the location of the station, or the name of the city, area or facility served, and such other information as necessary to identify the station as the identifier.

[2] 460.650–460.875 MHz inclusively.

resolution of interference problems. Even assuming that the use of the licensee's name would permit immediate recognition of the licensee of an interference source, it in no way ensures identification of the licensee's particular offending station.

5. In sum, the Commission is not convinced that the petitioner has presented any arguments which would justify allowing a different mode for identification for Business stations on 450–470 MHz frequencies or for stations operating on frequencies designated for land mobile operation in air terminals.

6. Accordingly, the Commission concludes for the reasons stated above that it would not be in the public interest to grant the subject petition. IT IS ORDERED, therefore, That the petition of ARINC (RM–1654) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1247

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CABLE VIDEO, INC., NORWICH, CONN., LISBON, CONN., FRANKLIN, CONN., SPRAGUE, CONN., BOZRAH, CONN. For Certificates of Compliance	CAC-1133 (CT039), CAC-1134 (CT040), CAC-1135 (CT041), CAC-1136 (CT042), CAC-1137 (CT043)

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 6, 1973)

BY THE COMMISSION:

1. Cable Video, Inc., has filed applications for certificates of compliance to begin cable television service at Norwich, Franklin, and Bozrah, Connecticut, located within the Hartford-New Haven-New Britain-Waterbury television market (#19), and at Lisbon and Sprague, Connecticut which, additionally, are located in the Providence-New Bedford television market (#33). The systems propose to offer subscribers the following television signals:[1]

WHNB-TV (NBC, Channel 30), New Britain, Conn.
WTIC-TV (CBS, Channel 3), Hartford, Conn.
WHCT-TV (Ind., Channel 18), Hartford, Conn.
WTNH-TV (ABC, Channel 8), New Haven, Conn.
WATR-TV (NBC, Channel 20), Waterbury, Conn.
WEDN (Educ., Channel 53), Norwich, Conn.
WJAR-TV (NBC, Channel 10), Providence, R.I.
WPRI-TV (CBS, Channel 12), Providence, R.I.
WTEV (ABC, Channel 6), New Bedford, Mass.
WCVB-TV (ABC, Channel 5), Boston, Mass.
WSBK-TV (Ind., Channel 38), Boston, Mass.
WNEW-TV (Ind., Channel 5), New York, N.Y.
WNYC-TV (Noncommercial, Channel 31), New York, N.Y.

Carriage of these signals is consistent with Section 76.61 of the Commission's Rules.[2] Objections to these applications have been filed by Connecticut Educational Television Corporation, licensee of Station WEDN, and Boston Broadcasters, Inc., licensee of Station WCVB-TV.[3] Cable Video has replied.

---

[1] Each of the proposed cable systems will have 30-channel capacity, and will provide all required access cablecasting services.

[2] Carriage of Station WNYC-TV will be authorized in accordance with our opinion in *Valley Cable Vision, Inc.*, FCC 73-1246, — FCC 2d — (1973).

[3] Objections directed to the franchises awarded Cable Video were filed by Broadcast Plaza, licensee of Station WTIC-TV, and Connecticut Television, Inc., licensee of Station WHNB-TV. These objections have been considered previously and were denied in *Valley Cable Vision, Inc.*, 38 FCC 2d 959, *recons. denied*, 40 FCC 2d 191 (1973).

2. Connecticut Educational Television Corporation objected to Cable Video's original plans to carry the signals of educational Television Broadcast Stations WGBH–TV, Boston, Massachusetts, and WSBE–TV, Providence, Rhode Island. However, on December 13, 1972, Cable Video amended its applications to delete its request for these signals, without prejudice, and thus, Connecticut Educational Television's objections have been rendered moot.

3. Boston Broadcasters objects to Cable Video's applications because Cable Video did not originally proposed to carry WCVB–TV on its systems as requested by the station. In support, Boston Broadcasters argues that WCVB–TV is a significantly viewed signal in New London County and on request is entitled to be carried on Cable Video's systems. Cable Video did not propose to carry WCVB–TV because it was not listed under New London County in the Commission's list of significantly viewed signals. Appendix B, *Cable Television Report and Order*, 36 FCC 2d 143, 387 (1972). WHDH–TV, predecessor of WCVB–TV, was, however, listed as significantly viewed. Concurrent with the filing of its objections, Boston Broadcasters filed a motion for declaratory ruling seeking to have the significant viewing status of WHDH–TV attributed to WCVB–TV. In its reply to Boston Broadcasters' objections, Cable Video stated that it would carry WCVB–TV on its systems if the Commission determined that the WCVB–TV signal was significantly viewed in New London County. In *Boston Broadcasters, Inc.*, FCC 73–904, — FCC 2d — (released September 13, 1973) we granted Boston Broadcasters' request for declaratory ruling and determined that WCVB–TV is significantly viewed. It will be certified for carriage on Cable Video's New London County systems, and Boston Broadcasters' objections, therefore, will be dismissed as moot.[4]

In view of the foregoing, the Commission finds that a grant of the subject applications is consistent with the public interest.

Accordingly, IT IS ORDERED, That the objections filed by Connecticut Educational Television Corporation ARE DISMISSED.

IT IS FURTHER ORDERED, That the oppositions filed by Boston Broadcasters, Inc., ARE DISMISSED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance filed by Cable Video, Inc., (CAC–1133 through 1137) ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[4] We will not require any further formal amendment to Cable Video's applications nor further public notice regarding the carriage of the WCVB–TV signal.

F.C.C. 73–1238

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 89 OF THE COMMISSION'S RULES AND REGULATIONS RELATING TO COMMUNICATIONS FOR EMERGENCY MEDICAL SERVICES	Docket No. 19880

NOTICE OF INQUIRY AND PROPOSED RULEMAKING

(Adopted November 28, 1973; Released December 4, 1973)

BY THE COMMISSION:

1. The Commission has been studying the expanding radio communications requirements for emergency medical service (EMS) which have long been matters of vital concern. In recent years, particular attention has been given to providing spectrum and a regulatory framework for meeting requirements for various hospital and ambulance radio communications services, including such specific problems as eligibility for non-profit health clinics, auditory training devices for the partially deaf, and bio-medical ambulance-to-hospital telemetering.

2. With increasing national efforts to improving delivery of emergency medical services to the public, even more intensive review of medical communications requirements has been in process in recent months by the Commission as well as by others involved in this important area. As part of this effort, Advanced Technology Systems, Inc. (ATS), under a Commission study contract, is examining the needs for emergency medical communication systems and the adequacy of present rule provisions for meeting these requirements. An interim report developed in the contract study has been submitted (attached as Appendix A). This report reviews the communication requirements of the medical community and has developed a number of conclusions that appear to indicate the necessity for new approaches to achieve effective medical communications.

3. The Commission has also received a report on this subject from the Office of Telecommunications Policy (OTP).[1] This report (attached as Appendix B) makes a number of major specific recommendations for rule changes. Basically, it is contemplated that a separate category of the rules be established for medical radio services, with dedicated frequencies related to various medical functions. Under this plan, "national calling" frequencies would be designated in the VHF

[1] *Report of the Interdepartmental Radio Committee to the Office of Telecommunications Policy on Emergency Medical Service (EMS) Communications.*

and UHF bands, and specified channels would be provided for paging, command and control, telemetry, hospital-to-hospital, and general medical services. To supplement the limited spectrum available for these purposes, the report further proposes the reallocation of three military frequencies and three other frequencies now shared by the Amateur Radio Service and the Federal Government for shared Government/non-Government medical services use; that four pair of radio call box frequencies now allocated to the local Government Radio Service be reallocated for medical services; that the use of UHF bio-medical telemetry frequencies be broadened to include other medical services; and that three presently unallocated frequencies be made available by the Commission. Under the program, all spectrum designated would be shared by Government/non-Government stations under regionalized, coordinated medical communications plans.

4. The findings and recommendations in the OTP and ATS reports are both extensive and urgent. It is determined, therefore, that it is in the public interest that careful and prompt consideration be given to these reports in an effort to meet the communication requirements for emergency medical service. However, before taking action on these reports, we believe it is desirable to obtain comments on the findings and recommendations from interested persons. Accordingly, Notice of Inquiry is hereby given and comments are solicited on these proposals. It should be noted that on the basis of these reports and the comments received in response to this inquiry, we may adopt amendments of Parts 2 and 89 of the Commission's Rules concerning medical services communications.

5. Recently, the Commission has received inquiries and requests for waiver of the rules to authorize medical communications systems that are not permitted by the present rules but are oriented towards the types of systems contemplated either in the OTP or ATS reports, or for licensing of medical operations such as bio-medical telemetry in services such as Class A and Class C Citizens, which the applicants believe are desirable for their particular operations. While some of these requests have merit, we believe it is premature to authorize, on a waiver basis, or in the Citizens Radio Service, new medical communications systems before we take a comprehensive look into this matter. Accordingly, aside from exceptionally unique situations, action on such application requests or for rule waivers will be postponed until after the conclusion of this proceeding.

6. Authority for these actions is contained in Sections 4(i) and 303 (r) and 403 of the Communications Act of 1934, as amended. In accordance with applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before January 10, 1974, and reply comments on or before January 25, 1974. Pursuant to Section 1.419(b) of the Commission's Rules, an original and fourteen copies of all statements, briefs, and comments filed shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken. The Commission may also take into account

other pertinent information before it in addition to specific comments invited by this Notice. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

NOTE.—Reports made available for public inspection in the Commission's Docket Reference Room at its Headquarters in Washington, D.C.

F.C.C. 73-1257

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
DR. BENJAMIN SPOCK AND THE PEOPLES' PARTY
against
AMERICAN BROADCASTING COMPANIES, INC., COLUMBIA BROADCASTING SYSTEM, INC., NATIONAL BROADCASTING CO.

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 5, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING

1. The Commission has before it a Petition for Reconsideration filed pursuant to Section 1.106 of its Rules and Regulations on December 6, 1972 by the Peoples' Party and its 1972 nominee for the office of President of the United States, Dr. Benjamin Spock. The petition requests that the Commission reconsider its decision of November 6, 1972 denying petitioners' fairness doctrine complaint of November 2, 1972, against the ABC, CBS and NBC television networks. The complaint argued that the networks had failed to broadcast adequate coverage of the controversial issues of public importance raised by the candidacy of Dr. Spock.

2. By letters of November 6, 1972, the networks set forth their various grounds for the denials of petitioners' complaint.[1] On November 6, 1972, the Commission issued its opinion denying petitioners' request for relief. Petitioners state that the Commission relied upon the following grounds in reaching its decision:

(1) The Commission only has power to order a personal appearance by a candidate where a licensee has failed to provide equal opportunities under Section 315;

(2) Complainants had not made their complaint directly to the networks before presenting it to the Commission;

(3) The complaint was not filed until November 3, 1972;

(4) Complainants did not allege facts sufficient for the Commission to conclude that the networks' decisions were unreasonable.

[1] ABC failed to serve a copy of its response on petitioners or their attorney. The Commission is not in receipt of any response by ABC to the Petition for Reconsideration.

The petitioners submit that the Commission erred on each of these four grounds, and asks that it reconsider and reverse its opinion of November 6, 1972.

3. NBC and CBS have replied to the Petition for Reconsideration asserting that the Commission ruling was proper and fully consistent with applicable authority. They state that the petition should be dismissed on grounds of mootness and lack of standing; that the alleged controversial issue was who should be elected; that this issue ceased to exist once the election was decided; and that absence of an alleged controversial issue of public importance removes the basis for a requirement that the Commission issue any further ruling on this fairness doctrine complaint or consider any further remedy. In response, the petitioners argue that a finding of mootness in a case of this type would in effect bar reconsideration of public interest questions "capable of repetition . . . evading review," citing *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); that a party's standing to challenge an action relating to an event is not affected by the passing of the event, *Roe* v. *Wade*, 41 U.S.L.W. 4213, 4216–17 (January 22, 1973); and that as a Presidential candidate affected by the networks' news decisions, and as the spokesman for an existing political party, Dr. Spock has the standing to present the instant complaint.

4. The petitioners maintain that they adhered to the proper procedure for the filing of a fairness complaint. They specifically state that adequate notice was given to the networks and that relief had been denied by them prior to the presentation of the complaint to the Commission; that the Commission's statement that they had not first presented their complaint to the networks is erroneous; that on November 1, 1972, they notified the networks by telephone of their fairness complaint and made requests for some coverage in the final days of the campaign; that NBC and CBS responded with assertions that no additional coverage of Dr. Spock's campaign would be provided; that NBC reasserted an earlier promise to interview Dr. Spock after the majority of the polls had closed on election eve; that ABC refused the request for compensatory time and stated that the question of other arrangements would be taken under advisement; and that the fact that these informal requests for relief had been presented to the networks was brought to the Commission's attention in the complaint. The petitioners further state that the preferred procedure for filing fairness doctrine complaints is set out in *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964); that a complainant is advised to communicate with the licensee to determine if it plans to afford an opportunity for the presentation of contrasting views; that their telephone communications to each of the three networks were sufficient to meet this requirement; that an additional requirement in appropriate circumstances is that they inquire as to what has already been done to deal with the controversial issue; and that they had over a period of time complained of the lack of coverage and assumed that the lack of any response indicating that there had been such programming evidenced its absence.

5. CBS states that a telephone call from the complainants was received near the close of business on November 1 by a member of CBS's Law Department; that it comprised merely a notification that a complaint was to be filed with the Commission the following day; and that the call "could in no sense be considered in timing or content" the kind of responsible communication necessary to the orderly administration of the fairness doctrine.

6. The petitioners further state that they should not be penalized for the proximity of the filing date of the complaint to the election date; that the late filing was a result of the erroneous impression created by the networks that adequate coverage was forthcoming; that the critical nature of media coverage immediately prior to the election and the possibility of irreparable harm caused by last-minute violations or broken promises of coverage inevitably will lead to matters coming to the Commission immediately before the election date. They note that the Commission as a general practice will resolve Section 315 complaints by telephone, or on an immediate basis down to the last day of the election; and submit that the Commission can provide comparable treatment in fairness doctrine cases involving political candidates.

7. The petitioners submit that the Commission erroneously failed to find a violation of the fairness doctrine. They assert that they have alleged sufficient facts with adequate specificity to establish a *prima facie* violation; that they have met the burden of proof outlined in *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969), in that they have established that extensive coverage had been given to only one side of a controversial issue; that the attachments to the complaint establish the Peoples' Party as a national party whose activity was far from marginal and established Dr. Spock's candidacy as substantial; that they made a detailed showing of the minimal amount of coverage which was given to their campaign; and that it would serve no useful purpose to require them to make an additional showing of the extensive coverage given to the Nixon and McGovern campaigns. They further contend that the controversial issue of public importance involved is which candidate was best qualified for the office of President; and that a campaign or individual candidacy can inherently raise a controversial issue of public importance, *In re Kay*, 24 FCC 2d 426, 427 (1970) (which candidate would best represent the party whose nomination was sought), aff'd, 443 F. 2d 638 (D.C. Cir., 1970); *Colby Broadcasting Co.* (*WJOB*), 32 FCC 2d 285 (1971). Petitioners state that the issue of Dr. Spock's suitability for the Presidency is intertwined with controversial substantive issues (i.e. the nationalization of industry and a guaranteed income); that the judgment of the networks not to afford more than minimal coverage of these controversial issues of public importance was outside of the bounds of the reasonable judgment vested in them; that the mere fact a candidate or viewpoint on an issue is not well known in a broadcast area will not excuse imbalanced presentation; that the Commission has ruled that when a fairness doctrine issue arises involving major and minor party candidates, the minor party candidate must be afforded coverage in proportion to the need and interest in the community, *In re Applicability of*

the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, question 15 at p. 10419; *Lawrence M. C. Smith*, 40 FCC 549 (1963); and that in any event, licensees must present some coverage of minority candidates. The petitioners also state that Dr. Spock was treated as a significant candidate by the networks on election day, when vote totals were reported for Mr. Nixon, Senator McGovern, Mr. Schmitz and Dr. Spock; that NBC interviewed Dr. Spock on election night regarding his future plans, an opportunity not afforded to other minor party candidates; and that he was one of the few candidates to meet the definition of a Presidential Candidate of a National Political Party contained in Title VII of The Revenue Act of 1971, § 41(c)(3)(A), P.L. 92–129 (1971).

8. In response NBC maintains that the petitioners failed to provide evidence of fairness doctrine violations by the networks. The network states that the petitioners only note the opinion of members of their own campaign staff based on a cursory analysis of the network's coverage of the 1972 campaign, and that, regarding elections, they have seemingly concluded that television's proper role is a passive one achieved by providing a forum for all candidates to discuss the issues as they would like to discuss them, rather than an active one of reporting activities, events, information related to the contests and views which it believes to be newsworthy.

9. In reply to these submissions the petitioners argue that the following facts are uncontroverted by the networks and clearly established Dr. Spock's campaign as an issue of public importance and controversy requiring coverage under the fairness doctrine:

(a) Dr. Spock was the candidate of a significant party.[2]

(b) The issue of his candidacy would reach at least 25 percent of the nation's voters.[3]

(c) They had a sound basis for determining that Dr. Spock's overall support was from 5 to 10 percent of the electorate.[4]

(d) They conducted an extensive campaign, including a major effort to contact voters across the country.[5]

(e) Dr. Spock was considered to be a significant candidate by the government and the media.[6]

(f) His personal reputation as an outspoken and credible critic of the government as well as his status as a well-known author made him a credible candidate.[7]

---

[2] Petitioners state that the Peoples' Party was formed as an amalgam of numerous other minor political parties and special interest groups; that the Party held a national convention, which was attended by delegates from all parts of the country and which received network news coverage; that the Party had run candidates in prior local and state elections; that the Party was clearly not a single-issue or single-election party; and that its announced purpose was, and still is, to build a viable party for this and future elections.

[3] The petitioners state that Dr. Spock was on the ballot in ten states, accounting for 25 percent of the nation's population and that, in addition, significant efforts were being made to achieve ballot status in other states.

[4] With regard to this assertion the petitioners refer to a statement of the Party's history included in an attachment to the complaint.

[5] With regard to this assertion, petitioners refer to a news article by John Pierson, staff reporter of the *Wall Street Journal*, entitled "The Candidate Seems Well-Liked, But Few Take Him Seriously."

[6] Petitioners state that Dr. Spock was afforded Secret Service protection; that this privilege was extended to only four candidates; that he was treated as a significant candidate in leading publications; and that he was covered by camera crews of major television networks.

[7] Again petitioners refer to the Pierson article, *supra*.

10. The petitioners further claim that the networks failed to provide reasonable coverage in that during Dr. Spock's entire three-month campaign, extending from August through September and October 1972, CBS and NBC provided no coverage of the campaign in their evening or prime time news programs,[8] and ABC provided only 2.5 minutes of coverage during its October 30 evening newscast.

11. NBC and CBS state that the petitioners appear to request the Commission to find that the networks, in formulating and presenting their news coverage, abused their discretion; that such a finding would constitute a violation of the Communications Act of 1934, as amended, and the First Amendment of the Constitution; that for the Commission to override the good faith judgments of broadcast journalists regarding the amount of news coverage given to one of the minor party candidates in the 1972 election would subvert the clear meaning of the exemptions to Section 315 of the Act, which were enacted with the specific intent to preserve to journalists questions of newsworthiness; and that pursuant to established precedents the Commission must refrain from undertaking a review of the news content of television programming, citing *Letter to ABC, et al.* 16 FCC 2d 650, 655–56 (1969). NBC further contends that the Commission has reviewed particular news activities only when well-documented charges of deliberate rigging or staging have been involved, *National Assn. of Theater Owners*, 19 RR 2d 799, 801 (1970), and that the petitioners have failed to allege any acts of deliberate staging or rigging by the networks in their campaign coverage. CBS adds that its news reporting has provided coverage of the Spock campaign and those of other candidates based on good faith judgments of newsworthiness; and that because Dr. Spock devoted time to campaigning does not in any way discredit these judgments and offers no basis for fairness doctrine relief.

12. In reply the petitioners state that the fairness doctrine is applicable to programming exempted from the equal time provision of Section 315; that Congress intended the Commission to review, under the fairness doctrine, the reasonableness of the coverage afforded to candidates and to take appropriate action where disproportionate coverage was granted to one or more candidates under the Section 315 exemptions; and that the Commission, therefore, has an obligation to determine whether a broadcaster's overall coverage of a minor party candidate was quantitatively fair under the fairness doctrine.

13. The petitioners also maintain that they did not request "equal opportunities" pursuant to Section 315; that the networks and the Commission have confused their request for one-half hour air time in the form of a personal appearance with a request for equal opportunities; that in certain instances the fairness doctrine can only be satisfied by granting access to one specific person; that the Commission has on several occasions ruled that specific persons must appear under the fairness doctrine, e.g., *Nicholas Zapple*, 23 FCC 2d 707 (1970); *Committee for the Fair Broadcasting of Controversial Is-*

[8] Petitioners state that CBS provided only seven minutes of coverage on one morning news program and that NBC provided only one opportunity for air time—a Section 315 response, and in morning time.

sues, 25 FCC 2d 283, *reconsideration sub nom: Republican National Committee*, 25 FCC 2d 739, 744 (1970), *reversed on other grounds sub nom; Columbia Broadcasting System* v. *FCC*, Case No. 24, 655 (D.C. Cir., November 15, 1971); that the purpose of the fairness doctrine is to insure that the public is given access to important information, *Democratic National Committee*, 25 FCC 2d 216, 227 (1970); that this purpose could best be achieved by permitting Dr. Spock personally to take his message to the voters; and that given the lateness of the hour, only he could adequately summarize and express his views to the public.

14. NBC concludes that the Commission has firmly established the principle that "the 'equal opportunities' provision of Section 315 relates to candidates; [while] the 'fair presentation' principle [i.e. fairness doctrine] . . . relates to issues"; (*Socialist Workers Party* ruling, FCC letter reference No. 8429, October 10, 1960), and rejects the theory that a person, simply by declaring his candidacy for elective office, thereby himself becomes a controversial issue of public importance. It states that the controversial issue presented is not whether a person who is a candidate should be elected, but who should be elected to the particular office; and that in a proper exercise of its discretion, it determined that the view that Dr. Spock should be elected did not constitute a significant view on this issue.

15. The petitioners in response state that a half-hour uninterrupted appearance was the only reasonable method available to the networks under the fairness doctrine to correct their imbalanced coverage; that this remedy is still appropriate despite the passage of the election since such an appearance could present a description of the Peoples' Party and support the Party's plans to participate in the 1976 election. They conclude that they have been frustrated in their attempt to obtain exposure to the electorate; that they cannot afford to buy time and therefore the offer of "equal opportunities" to buy time is, in effect, a no-time provision, *The Fairness Doctrine and Related Issues, Report of the Special Subcomm. on Investigation of the Committee on Interstate and Foreign Commerce of the House of Representatives*, H.R. 91–257, 91st Congress, 1st Session, 46 (1969); that the networks can provide coverage of some candidates via the exemptions from Section 315 (bona-fide newscasts, interviews, documentaries and on-the-spot coverage) without necessitating coverage of other candidates; that the fairness doctrine protects against these abuses; and that therefore the Commission should find a violation of the fairness doctrine and grant the Petition for Reconsideration.

16. First, we find that the petitioners have standing here to seek reconsideration of the Commission's initial disposition of their fairness doctrine complaint regarding broadcast coverage of their campaign. The Commission has reviewed fairness doctrine and Section 315 complaints concerning past events on many occasions, see *Black Caucus of the U.S. House of Representatives*, 40 FCC 2d 249 (1973); *Letter to Kenneth Cooper*, 39 FCC 2d 1000 (1973). And, although the election contest involving the petitioners have been decided, the questions presented by their complaint and instant petition may recur in future

104-019—74——2

campaigns. We therefore will consider this petition on the merits of its arguments.

17. The next question presented is whether petitioners brought the specifics of their complaint to the attention of the networks before seeking Commission action in accordance with the applicable fairness doctrine procedures. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 145 (1969); *Procedural Manual*, 37 Fed. Reg. 20510, 20512 (September 29, 1972). Although it appears that at various times during Dr. Spock's three-month campaign petitioners queried the networks as to the amount of coverage they were affording him, there is no evidence here to suggest that the networks were ever apprised of the basis or particulars of their fairness doctrine claims until they received copies of their complaint to the Commission on November 3. In this regard, petitioners' brief telephone calls to the networks on November 1 informing them of their intention to file a complaint with the Commission the next day cannot be considered the type of notice contemplated by the above-noted procedures. As petitioners correctly observe, the Commission generally will resolve Section 315 complaints on an immediate basis up until the day of an election, and this same policy would apply to a fairness complaint concerning an election which arises during the last days of a campaign. Here, however, petitioners' complaint was based on what they alleged to be "limited campaign coverage" over a three-month period and thus arose long before November 1. It therefore would appear that petitioners could have informed the Commission of their complaint before the final days of the campaign and also could have complied with the requirement of informing the networks of the particular grounds for such complaint before seeking Commission review of the matter. Although the petition might be properly dismissed for this procedural defect, we believe that the substantive issues which it presents are of considerable importance and should be decided. We therefore turn to the consideration of those issues.

18. The first substantive question raised by the pleadings is whether the networks were unreasonable in concluding that Dr. Spock's candidacy did not constitute a separate controversial issue of public importance within the meaning of the fairness doctrine. After careful review of the arguments presented, we hold that in an election for public office each individual candidate cannot be considered a separate controversial issue of public importance solely by reason of his candidacy or partisan campaign. We believe that the primary issue presented to the voters in an election is who among all the candidates should be elected, and that the individual candidates represent contrasting viewpoints on that issue. Under present fairness doctrine principles and interpretation, the broadcaster is only required to make reasonable judgments in good faith as to the significance of a particular candidate and so decide how much time should be devoted to coverage of his campaign activities; he is not required to provide a fringe party candidate with as much coverage as that afforded a major party candidate. *Letter to Lawrence M. C. Smith*, *supra*. The Commission has stated that the *Nicholas Zapple* ruling, *supra*, which

the petitioners cite, did not establish a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature, in the political broadcast area. We further stated:

> This would clearly undermine any future suspension or repeal of the "equal opportunities" requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates. The *Zapple* ruling did not overrule the holding in *Letter to Lawrence M. C. Smith. Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 36 FCC 2d 40 (1972).

Were we to endorse the petitioners' implied argument that each candidacy is in and of itself a controversial issue of public importance entitled to coverage under the fairness doctrine, the result would be unworkable and clearly contrary to the system of election campaign broadcasting which has evolved through statute and the implementing Commission rules and policies. We therefore cannot accept the petitioners' contention that Dr. Spock's candidacy was in and of itself a controversial issue of public importance requiring separate campaign coverage by the networks under the fairness doctrine.

19. In this regard, we find that the petitioners' reliance on *Colby Broadcasting, Co.* (*WJOB*), *supra*, and *In re Kay*, *supra*, is inapposite here. *Colby* concerned a political endorsement by a station in violation of the Commission's political editorial rule. The controversial issues of public importance in the case were the election contest and the issues involved therein. 32 FCC 2d at 286. In *In re Kay*, the complainant, the American Independent Party candidate for U.S. Senator from Ohio, contended that he was "entitled to time because his views on a number of issues were contrary to the views of the candidates for the Democratic and Republican nominations." His complaint was denied because he was not a candidate for either the Democratic or Republican nominations and the controversial issue there involved was which candidate would best represent the party whose nomination he was seeking. 24 FCC at 427. Thus, neither the *Kay* nor *Colby* rulings held or implied that a particular candidacy is in and of itself a controversial issue of public importance within the meaning of the fairness doctrine.

20. The second substantive question presented by the pleadings is whether the networks were unreasonable in concluding that Dr. Spock's candidacy did not represent a significant contrasting viewpoint on the controversial issue of public importance of who should be elected to the Presidency. As stated above, it is within the discretion of the broadcaster to determine the relative significance of the viewpoints on the election issue presented by the various individual candidates and to present election campaign coverage in accordance with that assessment. *Lawrence M. C. Smith*, *supra*. As in all other areas of the applicability of the fairness doctrine, the question presented to the Commission in the event of a candidate's complaint regarding the coverage afforded his particular campaign is not one which calls for the substitution of the Commission's judgment for that of the

broadcaster, but rather for a determination by the Commission as to whether the broadcaster can be said to have acted reasonably and in good faith. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, supra.* Here, petitioners have failed to show that the networks acted unreasonably or in other than good faith in determining that the view that Dr. Spock should be elected did not constitute a significant viewpoint on the issue of the 1972 Presidential election. The information before the Commission is that Dr. Spock was one of twelve candidates seeking the Presidency and that he was on the ballots of only ten states, in total representing only 25 percent of the nation's population. Although petitioners estimated Dr. Spock's strength at five to ten per cent of the national electorate and stated that he had conducted "an extensive national campaign," this information consists merely of their own opinion.[9] Considering these facts and circumstances, we cannot conclude that the networks' judgments as to the significance of Dr. Spock's candidacy were unreasonable.

21. Although framed in terms of the fairness doctrine, the petition appears to argue that Dr. Spock and his party have not been granted reasonable access to the broadcast media to advance their campaign. In particular, petitioners appear to argue that they have been frustrated in their attempt to obtain exposure to the electorate and that because they cannot afford to buy time, the equal opportunities provision of Section 315 is in effect a "no-time provision." In enacting the Federal Election Campaign Act of 1971 (Public Law 92–225, effective April 7, 1972), the Congress added Section 312(a)(7) to the Communications Act thereby requiring commercial broadcasters "to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." As the Commission stated in its Public Notice of March 16, 1972, entitled *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 37 Fed. Reg. 5796, the provisions of Section 312(a)(7) require commercial stations either to provide reasonable amounts of free time or to permit the purchase of reasonable amounts of time; they are under no obligation to afford both. 37 Fed. Reg. at 5805, Q. and A. 6, Section VIII. Legislation designed to require licensees to provide candidates with free time has not been enacted. There is no allegation or evidence before the Commission that the networks ever refused to permit petitioners to purchase reasonable amounts of time to advance Dr. Spock's candidacy, and therefore we have no grounds for a finding that the networks failed to comply with the reasonable access requirement of Section 312(a)(7).

22. Accordingly, for the reasons set forth above, the Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[9] Although not of decisional significance in this case since the election returns were of course not available at the time of the networks' decision, we note that Dr. Spock received only 78,801 of the 77,460,056 votes cast, or 0.1 per cent of the total.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JOHN L. SCHERER, JR., MINNEAPOLIS, MINN.
Concerning Fairness Doctrine Re Television Station KSTP–TV

DECEMBER 3, 1973.

MR. JOHN L. SCHERER, JR.,
4900 18th Avenue South,
Minneapolis, Minn. 55417

DEAR MR. SCHERER: This is in reply to your complaints against Television Station KSTP–TV, St. Paul, Minnesota.

In your complaint of December 10 and in your correspondence of December 26, 1971, you alleged that station KSTP–TV broadcast "on various nights" short spot announcements by the Vietnam Veterans for a Just Peace [hereinafter VVJP], and broadcast them as public service announcements. You state that "this is the first time to . . . [your] . . . knowledge that any station has provided free time to a single group to take a political position, terming it 'public service viewpoints.'" You also stated that the fact that VVJP was given free spot announcements "gives undue privilege to a single group and to a single political position."

By letters dated December 20, 1971 and January 5, 1972, the Bureau informed you that before appropriate action could be taken it must receive specific information setting forth reasonable grounds for your conclusion that a licensee in its overall programming has not afforded reasonable opportunity for the presentation of contrasting views on the Vietnam conflict. Further, the Bureau asked that you first bring your complaint to the licensee's attention. In reply to the Bureau's letter of January 5, you stated in correspondence dated February 2, 1972 that you presented your complaint to the licensee but were refused time by Stanley S. Hubbard, President of KSTP–TV, because he believed that "people against the war had had enough television time."

The Bureau in a letter dated February 23, 1972, and in reply to your letter of February 2, reiterated the necessity of its receiving specific information stating the reasons for your conclusion that the licensee in its overall programming failed to present opposing viewpoints to the VVJP spot announcements. In your letters of March 1, and April 16, 1972 you said that you were not satisfied with the Bureau's response to your correspondence and further stated that ". . . KSTP has not provided a programming schedule related to this issue and refused a request for equal time."

On May 10, 1972, the Commission also received a similar complaint from the Minnesota Clergy and Layman Concerned Committee [hereinafter Minnesota Clergy] against KSTP–TV regarding that station's

refusal to broadcast "Unsell the War" advertisements and its failure to broadcast opposing views in its overall programming to those expressed by President Richard M. Nixon. Inasmuch as their complaint set forth certain information which the Broadcast Bureau believed required comment by the licensee, an inquiry was sent to the licensee dated May 31, 1972 requesting its comments on the matters alleged. It should be noted that since your complaint and the Minnesota Clergy complaint raised similar issues the licensee was sent your complaint along with the complaint of the Minnesota Clergy and was asked to comment thereon.

In correspondence dated June 9, 1972 the licensee stated that both you and the Minnesota Clergy were demanding a right of access to broadcast their anti-war views; that the fairness doctrine does not require the licensee to open his broadcast facilities to all individuals who demand a right to broadcast their views; that complainants have failed to establish a *prima facia* fairness doctrine case; that the Vietnam War is a controversial issue of public importance and that KSTP–TV has presented pro and anti-war views on the Vietnam conflict; that KSTP–TV is affiliated with the NBC television network and it is public knowledge that the network has presented a wide variety of views on the Vietnam War; and that its local newscasts have carried a significant amount of anti-Vietnam War viewpoints. In your June 20, 1972 reply to the licensee's response you stated that KSTP–TV should not be allowed to cite the NBC network efforts in an attempt to balance programs which originate locally such as the announcements of the VVJP; that KSTP–TV is giving free time to one political party on an issue while refusing equal access to the opposing party; and that the licensee's vague reference to NBC should not be the basis for denying local groups broadcast time to reply to the VVJP's announcements.

On July 26, 1973 the licensee in response to a request by the Broadcast Bureau submitted additional material to supplement its June 9, 1972 reply. In the July 26 correspondence the licensee enclosed a list of various guests who represented the anti-war position and the time of their appearance.[1]

The licensee also enclosed various transcripts of news items broadcast on its station which contained anti-war views. In a September 18, 1973 letter in reply to the July 26's response by the licensee you stated that the licensee failed to broadcast anti-war views from November 11, 1971 to February 1972; that some of the anti-war spokesmen cited by the station, especially Shirley Maclaine, usually talked about women's liberation, SALT, and the McGovern campaign; that reporting news events related to the Vietnam War does not fulfill the Commission's

[1] The licensee stated that the following anti-war spokesmen appeared on the "Henry Wolf Show" for approximately a 17-minute interview: David Schoenbrun (2/21/71); Charles Goodell (3/28/71); Senator Vance Hartke (8/22/71); Representative Donald Fraser (9/5/71); John E. Galbraith (6/11/72); Herbert Scoville (7/2/72); Ronald Ross (9/10/72); David Schoenbrun (9/24/72); Allard Lowenstein (10/1/72); Shirley Maclaine (10/15/72); and David Halberstram (12/24/72). The licensee stated that the following anti-war spokesmen appeared on the "Charlie McCarty Show": Rev. Harry Burg (30 min. broadcast on 7/2/72); Paula Westerlund (25 min. broadcast on 7/30/72); Joe Serraggio (30 min. broadcast on 8/30/72); Glorianne McGillivary (date and time not specified); Marvin Davidof (30 min. broadcast on 9/17/72); Don Luce (25 min. broadcast on 10/15/72); and Dr. Benjamin Spock (30 min. broadcast on 8/6/72).

"equal time" provision; that news reports on the Pentagon Papers, anti-war demonstrations and statements by anti-war spokesmen ought to be treated neutrally and should not be considered to present the anti-war viewpoint; and that "reporting the news and allowing groups to discuss and propagate views are two separate functions of a television station."

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford a reasonable opportunity for the presentation of contrasting views in its overall programming and the broadcast licensee has an affirmative duty to encourage and implement the broadcast of those contrasting views. However, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

The threshold issue in this case is whether the licensee was unreasonable in determining that it had provided a reasonable opportunity for the presentation of anti-Vietnam War views in its overall programming. Before we discuss the licensee's presentations of the anti-war viewpoint it is important to clarify some conceptual aspects of the fairness doctrine, including the difference between the fairness doctrine and the "equal opportunities" provision. In your initial December 10 complaint you stated that KSTP–TV provided free spot announcements to the VVJP for pro-administration Vietnam War statements and ". . . has not offered equal time to groups taking different positions on the war." Both the "equal opportunities" provision and the congressional ratification of the fairness doctrine are contained within Section 315 of the Communications Act of 1934, as amended. However, they are not one and the same. The "equal time" provision of Section 315 applies only to the use of broadcast facilities by legally qualified political candidates while the fairness doctrine applies to all programming broadcast by the licensee. As stated above, the fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting views in its overall programming. The fairness doctrine does not require that "equal time" be afforded for each side. Thus, absent an allegation that a legally qualified candidate appeared on the VVJP spot announcements, Section 315's "equal time" provision is not applicable.

You contend that the free spot announcements provided the VVJP resulted in undue privilege to a single group and political position, and that KSTP–TV has failed in its fairness doctrine obligations in that it has not provided free spot announcements to anti-war groups. The Commission has consistently stated that, with some exceptions not applicable to this case, the licensee had discretion in discharging

his public interest obligation. The Commission in its *Editorializing Report*, 13 FCC 1246 (1949), stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests of time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request.

That policy has been reiterated in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416, and its 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). Thus, the clear thrust of Commission policy has always been to allow the licensee the widest possible discretion in determining how to meet its fairness doctrine obligations. You appear to suggest that the only way the licensee could meet its fairness doctrine obligations in this case would be to present the anti-war view via spot announcements. However, the Commission has never required a licensee to broadcast the opposing views within the same type of format as that which contained the original presentation of the controversial issue of public importance. Further, the Commission has never held that when one side of a controversial issue of public importance is presented through a regular campaign of spot announcements the opposing view must be given comparable or equal spot announcements. The real issue in determining whether a licensee has met its fairness doctrine obligations is whether the licensee had provided the opposing viewpoints with a reasonable opportunity in its *overall programming*.

You also suggest that the Commission should not consider the licensee's local news reports or the NBC network coverage of anti-war spokesmen in determining whether KSTP–TV fulfilled its fairness doctrine obligations. One of the most important aspects of the fairness doctrine is the concept that licensees will be allowed to use any format including newscasts, documentaries, interviews, debates, speeches and the like, to present opposing views. Thus, the licensee is not restricted in the type of format it may use to meet its fairness doctrine obligations, nor is it prevented from relying upon any type of program in addressing allegations of fairness doctrine violations. Therefore, the licensee may cite local newscasts and NBC network newscasts and programs in answering a fairness doctrine complaint.

Finally, you contend that pro-Vietnam spots were broadcast nightly for a four month period from November 1971 to February 1972 and that the licensee failed to provide a reasonable opportunity for anti-war viewpoints to be heard. However, this general allegation is not persuasive in light of the evidence that the licensee has provided the Commission. In addition to its regular news coverage, which we will

assume for argument sake presented balanced coverage of the Vietnam conflict, the licensee apparently broadcast at least 17 interviews with anti-war spokesmen from February, 1971 to October, 1972, lasting at least 357 minutes. You have not provided the Commission with any other information to support your contention that the licensee failed to meet its fairness doctrine obligations. Thus, from the information before us we cannot conclude that the licensee was unreasonable in its conclusion that it provided a reasonable opportunity for the presentation of anti-war viewpoints in its overall programming. Accordingly, for the reasons set forth above, your complaint is denied.

Staff action is taken here under delegated authority. Application for review may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours.

WILLIAM B. RAY,
Chief, Complaints and Compliance Division for Chief,
Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JEARL B. NUNNELEE, SUPERINTENDENT, HUERFANO SCHOOL, WALSENBURG, COLO.
Concerning Fairness Doctrine Re Station KFLJ

DECEMBER 3, 1973.

MR. FLOYD JETER,
General Manager Radio Station KFLJ,
Box 593,
Walsenburg Colo. 81089.

DEAR MR. JETER: This is in reference to letters of complaint written by Mr. Jearl Nunnelee on behalf of the School Board for Huerfano School District Re–1 and your responses thereto. Enclosed is a copy of the Bureau's letter of December 3, 1973 to Mr. Nunnelee.

Although there has been no apparent violation by you of the fairness doctrine, it appears that the statement broadcast regarding Mr. Nunnelee that he does not pledge allegiance to the flag constitutes a personal attack. (See the December 3, 1973 letter for a summary of the pleadings herein.)

In your letter of September 22, 1972 you contend that the statement was not a personal attack because a religious group adheres to a philosophy against pledging allegiance to the flag, and you further maintain that one of the participants in the discussion countered the remark by stating that he had been at many functions with Mr. Nunnelee and that he had pledged allegiance every time.

A personal attack for the purposes of the Commission's rules, is an attack "upon the honesty, character, integrity, or like personal qualities of an identified person or group." Stating that Mr. Nunnelee does not pledge the flag constitutes an attack on his character and integrity, particularly in light of Mr. Nunnelee's position in the community as Superintendent of Schools. Such a statement can indeed be damaging to his reputation and the respect he is able to invoke from the community.

Under the Commission's rules (47 CFR 73.123), when a personal attack is broadcast a station must within one week of the alleged attack: (i) notify the person or group attacked by the broadcast (ii) transmit a script, tape, or accurate summary of the broadcast if a script or tape is not available, and (iii) offer a reasonable opportunity to respond over the station's facilities. There is no indication here that you complied with these procedures. This letter is being placed in the appropriate Commission file where it will be available for consideration in connection with your overall performance as a licensee.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division for Chief,
Broadcast Bureau.

ATTACHMENT

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., December 3, 1973.

In reply refer to: 8330–B, C10–951, C10–328, C9–1398, and C5–1854.

MR. JEARL B. NUNNELEE,
Superintendent, Huerfano School, District Re–1,
Walsenburg, Colo. 81089

DEAR MR. NUNNELEE: This refers to the complaint filed by you on behalf of the School Board for Huerfano School District Re–1 against station KFLJ in Walsenburg, Colorado. We regret the delay in responding.

In a letter dated May 22, 1972, received May 26, you contended that the licensee denied your request for time to reply to charges against you by Mr. Jeter, owner and operator of KFLJ; that the controversy involved the School Board recall election held on May 23; that the School Board refused to attend a meeting on May 19, arranged by Mr. Jeter, because he was aligned with the group opposing them; that this two and one half-hour meeting was recorded and aired on May 20 over KFLJ; that Mr. Jeter was the moderator of the meeting and controlled it throughout; that it was in regard to charges made on this program that you requested time to reply; that the charges included the accusation that you do not pledge allegiance to the flag and statements as to your salary and that of Mrs. Nunnelee. You also state that on the program "Devotional Hour" a KFLJ employee, Mr. Ben Montoya, made an announcement in Spanish that the present School Board Members are "Robbers and thieves and should be thrown out of Office."

In response to a Commission inquiry regarding these allegations the licensee stated in a letter dated September 22, 1972 that the purpose of the May 19 meeting was to provide an opportunity for both sides to present the facts behind the issues and to get to the truth; that this meeting was taped and broadcast and did at all times give an opportunity for contrasting viewpoints on every issue; that each side took advantage of this; that Fred Eccher acted as spokesman for the Huerfano County Tax Payers Association (the group opposing the School Board); that the School Board was represented by Assistant School Superintendent John Mall, who was assisted by Ken Lippencott, then principal of the high school, and by Ronald Olsen, principal of Gardner School; that Miss Debbie Greene, a Vista Volunteer, also spoke in favor of the School Board; that Mrs. Bailey, a school teacher and a supporter of the School Board, held a stop watch to make sure that both sides were afforded equal time; that the format of the program consisted of questions directed to one side followed by comments by the opposing side; that no personal attack was made against you and Mrs. Nunnelee; that stating a matter of public record is not a personal attack; that a question from the audience was read asking your salary and that of Mrs. Nunnelee; that the School Board side spent considerable time elaborating the reasons for your particular salaries; that Mr. Eccher's remark that you do not pledge allegiance to the flag is not a personal attack inasmuch as there is a religious group who adheres to this philosophy; that Mr. Lippincott countered the remark by stating that he had been at many functions with you and that you had indeed pledged allegiance every time; that Mr. Ben Montoya did not say that the present Board

members were robbers and thieves, but that he did ask several times that listeners "vote si"; that in this regard "equal time" was afforded the opposing faction when some students and teachers staged a demonstration through town and included a stop at the radio station where they were invited in and allowed a liberal amount of time to air their shouts of "vote no"; that although in the overall campaign the Tax Payers Association bought the most advertising time, the School Board side had the advantage in free publicity for KFLJ broadcast "school news" (including School Board actions) in the most listened to time slot.

In reply to the station's response, in a letter dated September 26, you reiterated that the Board of Education refused to attend Mr. Jeter's meeting because he had, on a previous commentary on KFLJ, declared himself in opposition to the Board; that since the meeting was to be moderated by Mr. Jeter, the Board believed that this would give him undue control of what was said and that Mr. Jeter did not provide any air time for presenting information and views stated at the public meeting held on the same date as Mr. Jeter's meeting that was called and attended by the Board of Education. You also maintained that the School Board members involved in the recall election did not authorize anyone to represent them at Mr. Jeter's meeting; that many erroneous statements were made at the meeting; that accusations were made against the Board; that after Mr. Jeter's meeting you arranged for a paid announcement; that School Board member Mr. Virgil Ladurine also recorded a commercial announcement, but it was not aired because it was not of broadcast quality; that Mr. Jeter allowed questions to be answered about your salary and that of Mrs. Nunnelee and whether you both paid property taxes; that these questions were not asked in regard to other man and wife couples who teach in the school district; that Mr. Eccher's statement that you do not salute the flag is a falsehood and is damaging to your reputation as a school administrator; that Mr. Jeter's reasoning that because a particular religious group does not salute the flag no personal attack has been made would excuse anything from personal attack status if there is a religious group who adheres to the practice constituting the attack; that several people who understand Spanish have related that Mr. Montoya said that the Board members were thieves and should be thrown out of office; that one of them, you believe, would sign a statement as to this if necessary; that allowing students to yell "no" into a microphone is not a legitimate manner of providing "equal time"; and that there were no teachers among the demonstrating students as Mr. Jeter contends.

In a letter dated October 3, Mr. Jeter, in response to your statements, stated that at no time did he or any member of the KFLJ staff comment for or against the School Board; that you advised him that you wanted Dr. Vialpando to act as moderator; that since Dr. Vialpando had declared himself against the issue, the Tax Association would not agree to this; that the Board did not want Mr. Jeter to read the questions submitted; that the announcement advertising the meeting therefore stated that "the questions will be read as written without comment by the School Board or Tax Association members in an alternating manner"; that "when a School Board member reads a question, a Tax Association member will witness the reading and when a Tax Association member reads a question a School Board member will witness the reading;" that "each question will be answered by the side or party to whom it is directed and the opposite party will have an equal time to comment if they so desire"; that even though Mr. Nunnelee did not authorize anyone to represent the Board, the Assistant Superintendent of Schools and a school principal did speak on behalf of the School Board; that to his knowledge no accusation was made against any member of the Board; that he was not advised that there was a tape recording of the meeting Mr. Nunnelee arranged; and that Mr. Ladurine's tape was double track slow speed and difficult to understand. Mr. Jeter further states that he offered to remake this tape but received no reply; that with regard to the questions about your salary and that of Mrs. Nunnelee, Assistant Superintendent John Mall was also asked his salary and a rundown and explanation of the high school teacher salary schedule was presented by those representing the School Board; that Mr. Montoya is quite strong in denouncing your accusation and states that he spontaneously ended his program with "vote yes"; that this statement was countered with the "equal time" awarded to demonstrating students; and that teachers, including Mrs. Nunnelee, marched with the students.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

Although those speaking for the school board were not formally appointed as the appropriate spokesmen, it does not follow that they were thus unable to adequately present the School Board's viewpoints. Under the fairness doctrine the choice of appropriate spokesmen to present viewpoints on a public issue is one for the station licensee. In the absence of a showing of an abuse of this discretion, the Commission does not intervene. No such showing has been made here. It also appears that both the group in favor of the School Board and the group opposed were treated reasonably during the discussion, and that Mr. Jeter's role as moderator appears to be of minimal importance in that the questions asked were read by the participants themselves.

In view of the foregoing, it does not appear that KFLJ has failed to afford a reasonable opportunity for the presentation of contrasting views on the School Board issue.

In regard to your allegations as to Mr. Montoya's statements that "the School Board members are robbers and thieves," there is a dispute of fact as to what was actually stated. Should you furnish the Commission with substantiation that Mr. Montoya made the statement claimed, we will give this matter further consideration.

As to the statement accusing you of not pledging allegiance to the flag, enclosed is a copy of a letter sent to KFLJ notifying it that it has violated the Commission's personal attack rule.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY.
Chief, Complaints and Compliance Division for Chief,
Broadcast Bureau.

F.C.C. 73R–394

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of 5 KW, INC., WILMINGTON, OHIO	Docket No. 19218 File No. BPH–7074
CLINTON COUNTY BROADCASTING CORP., WILMINGTON, OHIO For Construction Permits	Docket No. 19219 File No. BPH–7122

MEMORANDUM OPINION AND ORDER

(Adopted November 30, 1973; Released December 4, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER

1. On October 15, 1973, 5 KW, Inc. (5 KW) filed a petition for reconsideration [1] in which it requests the Review Board to reconsider its Decision, FCC 73R–321, 28 RR 2d 472, released September 13, 1973, and, upon reconsideration, to deny the application of Clinton County Broadcasting Corporation (Clinton County) and grant that of its own.[2]

2. The mutually exclusive applications of 5 KW and Clinton County for a new FM broadcast station in Wilmington, Ohio, were designated for hearing by Order, FCC 71–410, 36 FR 7995, published April 28, 1971. The issues specified for resolution included financial qualifications issues as to both applicants and a standard comparative issue. On October 4, 1972, Administrative Law Judge Forest L. McClenning released an Initial Decision, FCC 72D–63, in which he concluded that both applicants were financially qualified. In his evaluation of the applicants under the comparative issue, the Judge concluded that Clinton County was entitled to substantial preferences under both the diversification and best practicable service criteria; and therefore that the public interest would best be served by granting that application. In a Decision, released September 13, 1973, (FCC 73R–321, 28 RR 2d 472), the Review Board, with minor modification, affirmed and adopted the Presiding Judge's Initial Decision.

3. It is well established that reconsideration will not be granted "merely for the purpose of again debating matters on which the [Com-

[1] Also before the Board for consideration are: (a) opposition, filed October 19, 1973, by Clinton County Broadcasting Corporation; and (b) Broadcast Bureau's opposition, filed October 30, 1973.

[2] On November 5, 1973, 5 KW filed an unopposed petition for leave to amend; the amendment reflects a change in the manager of 5 KW's AM Station WMWM, which is located in Wilmington, Ohio, as well as a letter granting an extension of credit which had expired on October 20, 1973. Since the amendment does not affect the comparative evaluation of the applicants and it serves to timely apprise the Commission of changes which have transpired, there is no impediment to its acceptance.

mission or Board] has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 2d 685, 686, 3 RR 2d 316, 317 (1964), affirmed *sub. nom. Lorain Journal Company* v. *FCC*, 122 U.S. App. D.C. 127, 351 F2d 824, 5 RR 2d 2111 (1965), *cert. denied* 383 U.S. 967 (1966). The Board is of the view, however, that this is precisely what petitioner has done. 5 KW's argument that the Board erred in failing to consider adequately its contentions concerning the ethical propriety of a proposed loan relied on by Clinton County is based upon a misapprehension of the Board's Decision. To the contrary, the Board gave careful attention to this matter, with special reference to the Presiding Judge's refusal to permit an inquiry as to the propriety of the loan under the existing limited financial issue, as well as the Review Board's subsequent denial of an appeal from that action, 31 FCC 2d 871, 22 RR 2d 1056. See Ruling on Exception No. 3(c), 28 RR 2d at 475. Thus, in this respect 5 KW has presented no argument which persuades us to depart from our prior determination that the propriety of the loan is not and should not be in issue in this proceeding. As pointed out in the oppositions, the fact that the Commission's Rules authorize inquiry into the ethical standards of attorneys practicing before it does not make this proceeding the appropriate forum for such a determination. Similarly, the Board is not persuaded that it erred in concluding that Clinton County demonstrated reasonable assurance that its advertising commitments will be met. The Board found that the contracts, statements of prospective advertisers, interrogatories and depositions, when considered together, give reasonable assurance that the projected advertising revenue will be available to meet the first two years of operating expenses. This finding is not, in our view, inconsistent with the holding in *Radio Geneva, Inc.*, 38 FR 7842, published March 26, 1973, relied on by the petitioner. In that case, the Commission ordered a hearing to determine the availability of estimated advertising revenues because of cancellation provisions and ambiguities in agreements relied on by the applicant. Here, however, the agreements to purchase advertising were tested through the hearing process and the conclusion that sufficient revenues will be available to meet costs of second year operation is amply supported by the record. Finally, despite 5 KW's failure to urge any arguments that are basically new in support of its case,[3] we have carefully re-examined the record in light of its arguments. Based on our re-evaluation of the record, we again conclude that grant of the application of Clinton County Broadcasting Corporation is warranted, and would best serve the public interest.

4. Accordingly, IT IS ORDERED, That the petition for leave to amend, filed November 5, 1973, by 5 KW, Inc., IS GRANTED and the amendment IS ACCEPTED; and

5. IT IS FURTHER ORDERED, That the petition for reconsideration, filed October 15, 1973, by 5 KW, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] As properly noted by the Broadcast Bureau, 5 KW's petition, to the extent it relates to "each and every" exception does not comport with the particularity requirements of Section 1.106(d)(1) of the Commission's Rules.

F.C.C. 73-1252

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (SHOREWOOD, OTTAWA, LOCKPORT AND CREST HILL, ILL.)	Docket No. 19550, RM-1859, RM-2049

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 4, 1973)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it the Report and Order and Order to Show Cause adopted in this proceeding on August 2, 1973, 42 FCC 2d 553 (1973).

2. In the above-mentioned document the Commission amended the FM Table by adding an assignment at Crest Hill, Illinois, (Channel 252A) and changing the assignment at Ottawa, Illinois, from Channel 252A to Channel 237A. Van Schoick Enterprises, Inc., the licensee of Station WOLI(FM), operating on the current Ottawa channel, was ordered to show cause why its license should not be modified to specify operation on the new channel. The response to the Order to Show Cause was received on September 14, 1973. It confirmed earlier indications that the licensee, assuming it were properly reimbursed for the expenses of making the change, was prepared to do so. It also mentions that the cost estimate was based on prices which may no longer be in effect when the change is to be made. This will be taken into account as will its concern that the change not take place before the new channel is assigned.

3. Language in the earlier document indicated that we would evaluate any response from the licensee of Station WOLI(FM) and would adopt appropriate orders. Neither in the station's response nor elsewhere is there any new information from any source to raise any question regarding the decision to effect a change in the Ottawa channel. Accordingly, the license for the station in question will be modified to specify operation on the new channel. This change will become effective with the expiration of the station's license on December 1, 1973, and the benefiting party shall provide reimbursement of legitimate and prudent out-of-pocket expenses in effectuating the change. If a delay arises in the use of Channel 252A at Crest Hill and hence in the matter of reimbursement, the licensee of Station WOLI(FM) may continue to operate on its present channel.

4. Accordingly, IT IS ORDERED, That effective 3:00 AM, December 1, 1973, with the expiration of its license and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license, held by Van Schoick Enterprises, Inc. for Station WOLI(FM) at Ottawa, Ilinois, IS TERMINATED insofar as it specifies operation on Channel 252A and any renewal of this license SHALL SPECIFY operation on Channel 237A subject to the following conditions:

(a) The licensee shall submit to the Commission by January 2, 1974, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WOLI on Channel 237A at Ottawa, Illinois.

(b) The licensee may continue to operate on Channel 252A until the new party at Crest Hill is ready to operate on this frequency or may effect the change sooner should it so desire. Ten days prior to commencing operation on Channel 237A, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(c) The licensee shall not commence operation on Channel 237A until the Commission specifically authorizes it to do so.

5. Authority for the actions taken herein is contained in Sections 4(i), 303, 307(b) and 316 of the Communications Act of 1934, as amended.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

44 F.C.C. 2d

104-019—74——3

F.C.C. 73-1159

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
GENERAL ELECTRIC COMPANY
For waiver of the all-channel television tuning rules

NOVEMBER 14, 1973.

Certified mail—return receipt requested.

MR. DONALD F. JOHNSTONE,
General Manager, Television Receiver Products Dept., General Electric Co., College Blvd., Portsmouth, Va. 23705.

DEAR MR. JOHNSTONE: This is in response to your letter of August 28, 1973 concerning waiver of the all-channel television receiver and comparable television tuning rules to permit shipment of television receivers specially designed for use in hospitals, hotels, motels, nursing homes and other similar facilities (hereinafter "institutions"). The receiver models in question would not be equipped with a UHF tuning system.

Such receivers would be used only in institutions equipped with a master antenna system on which UHF signals are converted to VHF frequencies for distribution to receivers, and only in locations where all available UHF signals can be carried on the system. They would be leased or sold only to such institutions or to companies which sell or lease to such institutions.

In the cases of hospitals and nursing homes which are so equipped, the Commission has waived the all-channel receiver rules to permit the receiver manufacturer to furnish receivers lacking a UHF tuner. Letter of May 16, 1973 to GTE Sylvania, 41 FCC 2d 331. One reason we have been willing to do so is that the close supervision of physical facilities and occupants typical of medical institutions minimizes the risk that the receivers will be removed from the institution and used to the detriment of UHF television stations. In the case of other institutions, where the risk of unauthorized removal is greater, we have been unwilling to waive the all-channel receiver rules or, in most respects, the comparable tuning rules. In the case of hotels, motels and educational institutions, however, we have permitted the receiver manufacturer to combine a remotable VHF tuner with a non-remotable UHF tuner, provided the UHF tuner is comparable in all other respects with the VHF tuner with which the receiver is equipped. Letter of May 16, 1973 to Philco-Ford Corporation, 41 FCC 2d 768. In the case of remote control operation, a common feature of institutional usage, use of a non-remotable UHF tuner effects a significant cost

saving. However, in view of the greater risk of removal, we are unwilling to go further.

Such waivers are granted only subject to the following conditions. When the receiver manufacturer sells or leases the receivers directly to the institution, he is required to furnish the following information to the Commission's Office of Chief Engineer:

The name and address of the institution.

The model number of the receiver.

A statement that the receivers will be connected to a master antenna system and that all available UHF and VHF TV signals will be carried on that system.

A statement that the manufacturer has taken steps to assure that receivers used apart from the master antenna system will first be reworked to assure that their operation apart from the system is fully in accord with FCC regulations.

When the receivers are leased or sold directly to the institution, the manufacturer is clearly in a position to examine the master antenna system and to ascertain that all available UHF signals will be carried on that system. Continuing control over the receivers can be maintained with a lease-takeback agreement, by an option to repurchase or rework the sets prior to use apart from the system, or in any other effective manner devised by the manufacturer. When the receivers are leased or sold to companies which sell or lease them to institutions (i.e., to a competitor), however, the manufacturer does not deal directly with the institution and therefore is not in a position to monitor each installation, to control use of the receivers apart from the master antenna system, or to furnish information or statements to the Commission. In such circumstances, these functions may be performed by the company which deals with the ultimate institutional customer, and the manufacturer must, in the sales contract or lease arrangement, require the company to perform such functions, or must take other measures assuring compliance with the rules. We would stress that the transfer of these functions does not relieve the receiver manufacturer of his ultimate responsibility for compliance with Commission requirements and with representations made to the Commission. The waiver goes to the receiver manufacturer. If the terms of the waiver, as carried forward into the sales contract or lease agreement, are violated, the Commission will look to the receiver manufacturer to enforce its contract or, if that is not feasible, to remedy any harm which has been done. If measures other than the specific contract provisions mentioned have been utilized to assure compliance, the Commission will look to the manufacturer to take those measures. The waiver is expressly conditioned on such an undertaking.

The terms of the waiver you suggest are not entirely consistent with the foregoing and to that extent are not satisfactory. You suggest that information furnished the Commission for particular receiver installations be submitted by the buyer, pursuant to a requirement in the sales contract or lease arrangement entered into by the manufacturer and the buyer. This arrangement is satisfactory only when the "buyer" is a company which sells or leases the receivers to the ultimate institutional user, not when the buyer is the institution; and, as indicated above, the manufacturer will remain responsible to the Commission for that com-

pany's compliance with its obligation to comply with the terms of the waiver and with representations made to the Commission.

In certain other respects also, the suggested waiver terms are unsatisfactory. You suggest that the waiver extend to receivers of this special design which are sold or leased to "hotels, motels, hospitals, nursing homes and similar special customers." We are limiting the waiver to hotels, motels, hospitals, nursing homes and educational institutions, the first four having been specifically mentioned in your petition and educational institutions having been considered in connection with a waiver granted to another firm. It may well be that this list can be extended, but we are not prepared to grant an open-ended waiver applicable to "similar special customers." In addition, as indicated above, the Commission is prepared to waive the rules for receivers furnished to institutions other than hospitals and nursing homes only with respect to the remote control aspect of comparable tuning. Such receivers must be equipped with UHF tuning systems which are comparable in all other respects to the VHF tuning system with which those receivers are equipped.

As part of the information submitted to the Commission, you suggest a statement that the receivers will be connected to a master antenna system and that "all normal UHF TV signals available in the area" will be carried by the system. The meaning of the term "normal UHF TV signal" is not clear. We wish it understood that the distribution system must be capable of carrying all viewable UHF signals, including weak or fringe area signals, if they are captured by the master antenna. If this is not the case, a conventional receiver should be utilized, with an all-channel distribution system if desired.

One final point remains. When this special design receiver is used, the firm which deals with the ultimate customer is responsible for the numerical display of available UHF channels, usually accomplished with tab inserts or stick-on channel numbers. This task should not be left to the institution.

Subject to the conditions set out in this letter and furnishing the information for each installation set out in the fourth paragraph of this letter, General Electric is hereby authorized to market receivers for use in properly equipped hospitals and nursing homes which lack the UHF tuner required by the all-channel television receiver rules and to market receivers for use in properly equipped hospitals, nursing homes, hotels, motels and educational institutions which combine a nonremotable UHF tuner with a remotable VHF tuner, provided the UHF tuning system is comparable in all other respects to the VHF tuning system with which the receiver is equipped.

Applications for certification of the receiver models to which this waiver applies should identify the receiver as a special purpose model, should include a copy of this letter, and should contain a statement that use of the receiver will be in accord with the provisions of this letter. It should also include a statement that the information specified in the fourth paragraph of this letter will be submitted to the Commission's Office of Chief Engineer in writing prior to each installation of receivers.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

F.C.C. 73-1260

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF GREATER INDIANAPOLIS BROADCASTING CO., INC., LICENSEE OF RADIO STATION WXLW, INDIANAPOLIS, IND.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 5, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated June 27, 1973, addressed to Greater Indianapolis Broadcasting Company, Inc., licensee of Radio Station WXLW, Indianapolis, Indiana, and (2) a response to the Notice of Apparent Liability received July 31, 1973.

2. The Notice of Apparent Liability for two thousand dollars ($2,000) was issued pursuant to Section 503(b)(1)(E) of the Communications Act of 1934, as amended, for apparent violation of Title 18 of the United States Code, Section 1304, which prohibits the broadcasting of lottery information. The contest was described in the Notice of Apparent Liability as follows:

> [Commission field investigation indicated that] during the summer of 1972 WXLW conducted a station promotion called the "XL-95 Golf Classic," a contest which listeners could enter by visiting a participating merchant's place of business, picking up an "XL-95 scorecard," playing 18 holes of golf on any course, having the pro at the course sign the card, and mailing the card to WXLW. Thereafter, scorecards were drawn at random by WXLW to determine the winners of prizes. The actual score on the card was immaterial to eligibility for any of the prizes—the sole determination of winners was made by the random drawing.
>
> Since the contest apparently combined the elements of prize, chance (in the drawing of the scorecards), and consideration (in paying the greens fee or country club membership fee in order to play golf), it appears that the "XL-95 Golf Classic" was a lottery within the definition set out in Section 73.122(b) of the Commission's Rules. WXLW program logs indicate that announcements promoting the "XL-95 Golf Classic" were broadcast on WXLW on the following days: June 6 through 30, July 1 through 31, August 1 through 31, and September 1 through 5, 1972.

The Notice of Apparent Liability informed the licensee that broadcasts such as those described above appeared to violate Title 18 U.S.C. Section 1304 and by the terms of the statute (each day's broadcasting constituting a separate offense) the licensee had apparently violated

the statute 92 times during 1972. The forfeiture proceeding was confined to those violations occurring within one year preceding the issuance of the Notice of Apparent Liability.

3. In its response to the Notice of Apparent Liability licensee asserts that the Notice contains only a limited description of the facts surrounding the contest. The licensee's version of the facts is as follows:

> The contest basically provided that members of the general public were given the right to participate in a golf tournament which was sponsored by Radio Station WXLW. In order to enter the tournament, a person could pick up a score card without cost at a number of participating stores. It was not required that the contestant make any purchase in the stores, and it should be pointed out that none of the participating sponsors were in any way connected with the golf courses in the area. The contestant, after picking up the free score card, then played a round of golf at a golf course of his own choosing. After playing the round of golf, he would then have the score card signed by the golf pro and then it was mailed to the station.

The licensee's response argues that the element of "chance" in the contest did not exist to constitute a lottery.

> We would also point out that the statement made in the Notice of Apparent Liability that "The actual scores on the card was immaterial to eligibility for any of the prizes and the sole determination of winners was made by the random drawing", is not completely accurate. After the contestant had played his initial round of golf and had his score card signed and sent it in, he was then eligible to play in the tournament, which was held at a local golf course. The station rented the golf course so that the contestant paid no fee for this round of golf. Unless the contestant played in this tournament, he was not eligible for any prizes. If he did play, his score on the tournament round was matched with the score that he had previously played and if he bettered that score, he did obtain a prize. There were also certain prizes that were awarded during the course of the tournament, based on making a hole in one or coming closest to making a hole in one, and also prizes were physically located on the course, and if the player struck one of the prizes, he would win it. Consequently, the award of prizes in the tournament was not determined on the basis of a random drawing and, therefore, the element of lottery was not present.

4. The licensee argues that another element of a lottery, consideration, was not present in the "XL–95 Golf Classic." Licensee states:

> None of the golf courses in the area were sponsors of the contest, there was no "consideration" flowing to any of the advertisers or to the station, which is the essential prerequisite for a lottery as defined by the United States Supreme Court in the case of *Federal Communications Commission* v. *American Broadcasting Company* [347 U.S. 284, 98 L.Ed. 699, 74 S. Ct. 593 (1954).] . . . In that case, the Court held that where one attains a free application to participate, the fact that his application is later used for a basis of receiving a prize, does not constitute a lottery.

The licensee then requests, in view of its argument, that the Notice of Apparent Liability be vacated.

5. The licensee contests our observation in the Notice that the actual scores on the cards were immaterial to eligibility for the prizes and that the sole determination of winners was by random drawing. In that regard, we refer to Rule "(5)" printed on the reverse of the WXLW "Official Score Card" which provides: "A *drawing* will be held from all submitted cards *to select finalists* who will participate in the XL–95 Golf Classic Finals, September 15, 16, and 17, 1972, to compete for over $25,000 in prizes. Finalists will be notified by mail."

Rule "(6)" states: "Cards become eligible for *special prizes* awarded during the qualification period as soon as they are received by WXLW." [Emphasis supplied.] Information before us indicates that the aspect of the contest contemplated by the contest rules cited *supra* involved the drawing of cards at random and the subsequent awarding of transistor radios and theatre tickets as prizes to those persons whose score cards were drawn. The contestants who played in the "Golf Classic Finals" included these winners. The evidence indicates the licensee conducted a drawing of the score cards during the qualifying period June 6 to September 4, 1972, to determine the winners of the radios and tickets. Based on the foregoing, we find that the element of chance existed in connection with the "XL–95 Golf Classic" within the definition set out in Section 73.122(b) of the Commission's Rules.

6. However, upon further study of this matter, we have concluded that the lottery element of consideration is not present. We base this conclusion upon the absence of any indication that consideration substantial enough to support a finding that there was a lottery flowed, directly or indirectly, from the participants to the promoter. While it is clear that where the purchase of a product or service entitles the buyer to a chance at a prize there is adequate consideration, *Horner* v. *United States*, 147 U.S. 449, we know of no case interpreting the federal lottery statutes where a lottery was found to exist without a receipt of the consideration by the promoter.[1] We believe that the evils sought to be prevented by the prohibition of lotteries include not only the appeal to a gambling spirit and the risk of loss by the participants, but also the unjust enrichment of the manipulator of the scheme. It was stated in *Post Pub. Co.* v. *Murray*, 230 F. 773, 775 (C.A.1, 1916), *cert. den.* 241 U.S. 675, that a newspaper's offering of prizes to women who recognized headless photographs of themselves taken in the city's shopping district and published in the paper was not a lottery because the authorities "all apparently proceed upon the idea that the statute was directed against schemes which involved specific intent to induce members of the public to part with money . . ." And the Supreme Court in *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, held that there was insufficient consideration in the "give-away" programs to bring them within the prohibition of the statute, rejecting the Commission's view that consideration in the form of money or a thing of value is not essential.[2] See also *Caples Company* v. *United States*, 100 U.S. App. D.C. 126, 243 F. 2d 232 (1957), holding that going to the promoter's place of business is insufficiently valuable consideration. If the participants' activity relied upon in these two cases was insufficiently substantial, it is, we believe, difficult to sustain the proposition that there is a lottery without any additional benefit to the promoter (here WXLW), even though the participants in the contest may make some payment to someone else in order to participate,

[1] *Brooklyn Daily Eagle* v. *Voorhies*, 181 F. 579, 581–582 (C.C.E.D., N.Y.), which contained *dictum* to the contrary, in fact involved sending in labels from the promoter's product.

[2] The Court noted that the cases seemed to be uniform in construing the postal lottery statutes as requiring a valuable consideration.

at least so long as there is no indirect flow through of the payment to the promoter. We are strengthened in this view by the Supreme Court's heavy reliance in *American Broadcasting Co.* upon the fact that what was involved was construction of a criminal statute. The required strict construction of 18 U.S.C. § 1304 would not appear to reach the promotional scheme here involved.[3]

7. In view of what has been said above, IT IS ORDERED, That the Notice of Apparent Liability issued on June 27, 1973, IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] To the extent that our decision here is contrary to previous rulings, they are reversed.

F.C.C. 73R-400

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC., COMPLAINANT, versus THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT Complaint, Pursuant to Section 208 of the Communications Act of 1934, Demanding Compensation for Expenses Incurred in the Handling of Messages on Behalf of the Western Union Telegraph Co.	Docket No. 19344

ORDER

(Adopted December 5, 1973; Released December 7, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. The above-captioned proceeding was designated for hearing by Memorandum Opinion and Order, released November 8, 1971, FCC 71-1134, 32 FCC 2d 315. ITT World Communications, Inc. (ITT) asks that Western Union Telegraph Company (WU) compensate ITT for services it performed for WU in handling overseas messages between May, 1968 and October, 1969. In his Initial Decision, released February 9, 1973, FCC 73D-5, the Administrative Law Judge concluded that ITT was entitled to reimbursement for certain services it performed for WU during the above period and directed that ITT and WU submit to the Judge a statement specifying the amounts paid, or to be paid, ITT. In compliance with that Order, ITT and WU submitted estimates based on the formula set forth in the Initial Decision—ITT calculated it was owed $139,892; WU calculated it owed $61,889. Since neither ITT nor WU agreed with the Judge's formula, and in light of their inability to reach an agreement over what was owed ITT, both parties filed exceptions with the Review Board. On December 4, 1973, oral argument was heard before a panel of the Review Board.

2. After reviewing the record and the pleadings filed by the parties, and hearing oral argument, it appears to the Board that this proceeding has been needlessly protracted to the detriment of both ITT and WU as well as the Government in both time and expense. The two parties have traditionally engaged in a cooperative effort to maximize their profits as well as provide the beneficial service of transmitting internationally bound messages on behalf of the public. We fail to

understand, given the relationship of the parties and the context in which the dispute arose, why they have been unable, through good faith negotiations, to reach a settlement and obviate the necessity for this proceeding. Consequently, in an effort to terminate this proceeding without further delay and added expense, the Board, before issuing a decision, will direct both ITT and WU to enter again into good faith negotiations looking toward a settlement of this proceeding. Such a settlement would not only be in the public interest, but in the interest of the parties as well as the Government.

3. Accordingly, IT IS ORDERED, That Western Union Telegraph Company and ITT World Communications, Inc. immediately undertake further negotiations in an effort to settle their dispute and submit to the Review Board within ten (10) days from the release of this Order a statement describing what further negotiations have taken place and whether a settlement has been reached.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1249

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JIMMIE H. HOWELL, MILTON, FLA.	
Requests: 1330 kHz, 5 kW, Day	Docket No. 19882
H. BYRD MAPOLES, TRADING AS MAPOLES BROADCASTING CO., MILTON, FLA.	File No. BP-19402
	Docket No. 19883
Requests: 1330 kHz, 5 kW, Day	File No. BP-19403
AARON J. WELLS, MILTON, FLA.	
Requests: 1330 kHz, 5 kW, Day	Docket No. 19884
	File No. BP 19430
RADIO SANTA ROSA, INC., MILTON, FLA.	Docket No. 19885
	File No. BP-19431
Requests: 1330 kHz, 5 kW, Day For Construction Permits	

ORDER

(Adopted November 28, 1973; Released December 4, 1973)

BY THE COMMISSION:

1. The Commission has for consideration the above-captioned mutually exclusive applications seeking to replace the deleted facilities of former station WEBY, Milton, Florida.

2. The application of Jimmie H. Howell indicates that he was indicted by the Santa Rosa Grand Jury on April 20, 1973. Howell, a County Commissioner, was charged with soliciting a $4,000 bribe from the manager of a heavy equipment company in connection with the awarding of county contracts in violation of Florida Statute 838.02. In light of Howell's alleged criminal activity, the Commission is unable at this time to make a determination as to whether he has the requisite qualifications to be a broadcast licensee. We have decided, therefore, to order that in the event the Administrative Law Judge determines that Jimmie H. Howell is the preferred applicant, he shall withhold his Initial Decision until notified by the applicant of the result of the criminal proceedings. Upon notification indicating that Howell has not been acquitted, the Administrative Law Judge shall add such further issues and hold such further proceedings as may be necessary to determine Howell's qualifications.

3. The information concerning the aforementioned indictment was first contained in an amendment filed by Howell on November 6, 1973. Since the indictment was returned by the grand jury in April of 1973, and since during the interim six-month period Howell filed several

amendments without disclosing the indictment, a substantial question exists as to whether he has complied with the provisions of section 1.65 of the Commission's rules. Thus, we have included an issue with respect thereto.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since they are mutually exclusive, however, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, that pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Jimmie H. Howell has complied with the provisions of section 1.65 of the Commission's rules by keeping the Commission advised of substantial changes in his status and informing the Commission of all matters of decisional significance and, if not, the effect of such non-compliance upon his basic and/or comparative qualifications.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That if the Administrative Law Judge determines that Jimmie H. Howell is the preferred applicant, he shall withhold his Initial Decision until notified by the applicant of the result of the criminal proceedings in the Circuit Court of the First Judicial Circuit of Florida, Case No. 73–5231F, and upon notification that Jimmie H. Howell has not been acquitted, shall add such further issues and hold such further proceedings as may be necessary to determine Howell's qualifications to be a licensee of the Commission.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of LAKE TELEPHONE CO., MEMORIAL POINT, TEX. For Certificate of Compliance	CAC-869, TX261

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 5, 1973)

BY THE COMMISSION:

1. On July 19, 1972, Lake Telephone Company filed an application for a certificate of compliance in which it proposed to operate a new cable television system at Memorial Point, Texas, an unincorporated community located outside all television markets.[1] The applicant proposes to carry the following television signals:

KPRC-TV (NBC, Channel 2), Houston, Tex.
KUHT (Educ., Channel 8), Houston, Tex.
KHOU-TV (CBS, Channel 11), Houston, Tex.
KTRK-TV (ABC, Channel 13), Houston, Tex.
KVRL (Ind., Channel 26), Houston, Tex.
KHTV (Ind., Channel 39), Houston, Tex.
KTRE-TV (NBC/ABC Channel 9), Lufkin, Tex.
KFDM-TV (CBS, Channel 6), Beaumont, Tex.

The proposed signal carriage is consistent with the cable television rules, and the application is unopposed.[2]

2. Lake Telephone seeks waiver of the franchise-holding requirement of Section 76.31 of the Rules because it contends that unincorporated communities in Texas lack the authority to issue a franchise. In support of its contention, Lake Telephone furnishes a letter it received from Mr. E. L. McClendon, Jr., County Attorney of Polk County. The letter states in pertinent part:

> There is not a franchise requirement which concerns CATV operations set out by the State of Texas or by Polk County, Texas.

Accordingly, Lake Telephone requests special relief pursuant to Section 76.7 of the Commission's Rules to qualify under Par. 116, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), which provides for case-by-case consideration where it is

[1] Lake Telephone Company was granted a waiver of Section 214(a) of the Communications Act until March 16, 1974, in order to operate a cable television system. *See Lake County Telephone Company*, FCC 73-577, 41 FCC 2d 335.

[2] Memorial Point has a population of 500, and seven subscribers are presently being served as a master antenna (MATV) distribution service. The system will have 20-channel capacity of which eight channels will be used for carriage of television broadcast signals and one channel for time-weather.

claimed that there is no franchise or other appropriate authorization available for the cable operator to submit in an application for certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal for assuring that the substance of our rules, and specifically Section 76.31, is complied with.

3. In support of its request, Lake Telephone has made the following representations to the Commission: (a) cable operations will commence immediately after certification, and it is estimated that within the first year it will provide service to at least 100 homes; (b) applicant will maintain a local business office which will be open during normal business hours to receive and act on subscriber complaints; (c) applicant will charge an installation fee of $10 and monthly charge for service of $5.95 with a 50-cent charge for additional television sets; (d) changes in these rates will be subject to approval by any local agency which asserts jurisdiction over such rates; and (e) applicant states it will comply fully with all local and federal regulations.

4. We believe Lake Telephone has submitted an "acceptable alternative proposal" which assures compliance with the substance of Section 76.31 of the Rules. *Coastal Cable, Inc.*, FCC 73–631, 41 FCC 2d 857. Therefore, a certificate of compliance will be issued until March 16, 1974, subject to the same conditions that we have imposed in other similar cases: [3] This grant is made subject to any further orders of the Commission designed to resolve general problems inherent in nonfranchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–869), filed by Lake Telephone Company IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

---

[3] E.g., *Mahoning Valley Cablevision, Inc.*, FCC 73–347, 40 FCC 2d 439.

F.C.C. 73-1279

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ROGER D. OLSEN (W269AA), GRAND RAPIDS, MINN. For Construction Permit for New FM Translator Station	File No. BPFT-96

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration its action of September 6, 1973, granting without hearing the above-captioned application of Roger D. Olsen for a construction permit for a new 10-watt FM broadcast translator station to serve Grand Rapids, Minnesota, by rebroadcasting station KEZZ(FM), channel 232 (94.2 MHz), Aitkin, Minnesota, on output channel 269 (101.7 MHz) (*Roger D. Olsen*, FCC 73-905, released September 14, 1973, 28 RR 2d 493), a petition for reconsideration, filed pursuant to section 405 of the Communications Act of 1934, as amended, by Itasca Broadcasting Corporation, licensee of standard radio station KOZY, Grand Rapids, Minnesota, and permittee of station KOZY-FM, channel 244 (96.7 MHz), Grand Rapids, Minnesota, on October 11, 1973.[1]

2. Petitioner reiterates its contention that there is no need for the proposed translator, alleging that petitioner is proceeding expeditiously with the construction and activation of station KOZY-FM. Petitioner also suggests that the Commission may have been unaware of the pendency of a petition for rule making (RM-2235) filed by the National Association of Broadcasters on July 30, 1973, proposing to restrict all commercial FM translator stations to areas within the predicted 1 mV/m contour of their primary stations. Petitioner contends, once again, that the translator is required to provide a minimum signal of undefined strength to the principal community to be served, and, finally, that Olsen may not be authorized to operate an FM translator within 250 miles of the Canadian border.

3. That part of our decision related to the question of need was not predicated upon petitioner's failure to construct its authorized FM station in Grand Rapids, but rather upon its failure to demonstrate a

[1] The applicant filed a response to the petition for reconsideration on November 2, 1973, and petitioner filed a reply thereto on November 8, 1973.

lack of need for the translator. We merely observed, in passing, that the fact that there was but one radio station in operation in Grand Rapids would appear to weaken petitioner's position and activation of Grand Rapids' only authorized FM station would not materially alter the situation. Petitioner has cited no authority for its contention that a translator station is required to provide signal strength of a specific intensity to its principal community nor has it cited any authority for the proposition that we may not authorize an FM translator within 250 miles of the Canadian border without the concurrence of the Canadian government. In fact, there are no such requirements. In paragraph 8 of the *Report and Order* in Docket No. 17159 (FCC 70–1042, 20 RR 2d 1538), we stated:

> FM translators proposed within 20 miles of the Canadian border are subject to coordination with the Canadian government.

Station W269AA is not within 20 miles of the Canadian border. Finally, petitioner may be assured that the Commission was well aware of the pendency of the rule-making petition filed in July 1973 when, in September 1973, it acted upon the Olsen application.

4. We have reviewed with care the allegations made by petitioner and we are unable to discover any matters which have not been previously presented to and considered by the Commission. We need not consider again matters which have already been presented, considered and disposed of; the petition will, therefore, be denied. The *Spartan Radiocasting Company* (*WO9AV*), 22 FCC 2d 920, released May 11, 1970.

Accordingly, IT IS ORDERED, That the petition for reconsideration filed herein by Itasca Broadcasting Corporation IS DENIED, and the Commission's action of September 6, 1973, granting the above-captioned application of Roger D. Olsen IS REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73–1289

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re PENINSULA BROADCASTING CORP., AHOSKIE AND MURPHREESBORO, N.C. For Waiver of Section 76.501 of the Commission's Rules	CSR–377(X)

MEMORANDUM OPINION AND ORDER

(Adopted December 6, 1973; Released December 11, 1973)

BY THE COMMISSION: COMMISSIONER WILEY ABSENT.

1. On May 30, 1973, Peninsula Broadcasting Corporation, licensee of WVEC–TV, Hampton, Virginia, and operator of cable television systems at Ahoskie and Murphreesboro, North Carolina, filed a "Petition for Waiver" requesting a waiver of Section 76.501 of the Commission's Rules.[1] Peninsula's petition is unopposed; however, the "Comments" of the National Citizens Committee for Broadcasting have been accepted as informal pleadings and have been considered herein.[2]

2. Peninsula has operated WVEC–TV since 1953. Peninsula began cable television operations in Ahoskie and Murphreesboro prior to December 12, 1968, and now operates a twelve channel cable television system in each community carrying eight signals. The Ahoskie system has 424 subscribers out of a potential of 1500, and the Murphreesboro system has 133 subscribers out of a potential of 1200. WVEC–TV's predicted Grade B contour extends approximately 16 miles past Ahoskie and 17 miles past Murphreesboro, North Carolina. Five other television stations place predicted Grade B contours over both communities, and one additional station's predicted Grade B contour encompasses Ahoskie.

3. Ahoskie and Murphreesboro have populations of 5,105 and 3,508, respectively, and are located outside all television markets, near the fringe of WVEC–TV's service area. Each community has one AM and one FM radio station and each has a weekly newspaper. Hampton, Virginia, WVEC–TV's city of license, is part of the Norfolk-Newport News-Portsmouth-Hampton, Virginia television market (#44).

4. We find that the location of these communities, near the fringe of WVEC–TV's predicted Grade B contour and outside all television markets, the small populations of the communities involved, and the relative availability of non-Peninsula mass media sources are such

[1] For the background which gave rise to the present proceeding, see Paras. 1–2, *Ft. Mason TV Improvement Co.*, FCC 73–1285, — FCC 2d —.
[2] *See* Note 2, *Ft. Mason TV Improvement Co., id.*

104–019—74——4

that divestiture will neither enhance competition for advertising dollars nor increase competition in the marketplace of ideas. We feel justified in concluding that because of the small populations and the limited number of subscribers, it is unlikely that any cable operator in these communities will engage in extensive local origination cablecasting. The common ownership of a television station in Hampton, Virginia is not likely to discourage Peninsula from attempting to originate programs or sell advertising in conjunction with cable television systems at Ahoskie and Murphreesboro, North Carolina, some 60 miles from Hampton. The unlikelihood of extensive local origination cablecasting, the distance from Hampton to the cable communities, and the equal availability of other television stations, radio stations, and newspapers unassociated with Peninsula convince us that a waiver of Section 76.501 would serve the public interest. Of course, Peninsula will not be permitted to expand its cable television operations within its predicted Grade B contours beyond the two communities it now serves.

Accordingly, IT IS ORDERED, That the above captioned petition for waiver filed by Peninsula Broadcasting Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73R–405

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO NEW JERSEY, HACKETTSTOWN, N.J. For Construction Permit	Docket No. 18252 File No. BP–16987

APPEARANCES

Lauren A. Colby and *Eugene F. Mullin, Jr.*, on behalf of Radio New Jersey and Lake-River Broadcasting Corp.; and *Richard M. Riehl* and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 5, 1973; Released December 11, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. In an Initial Decision, FCC 72D–58, released August 31, 1972, the late Administrative Law Judge Millard F. French recommended grant of the application of Radio New Jersey (RNJ) for a new standard broadcast station at Hackettstown, New Jersey. The Judge, in his Initial Decision, also recommended approval of agreements for partial reimbursement of out-of-pocket expenses of Lake-River Broadcasting Corp. (Lake-River), whose application for a station at Lakewood, New Jersey, has been dismissed. The RNJ and Lake-River applications were designated for hearing by Order, FCC 68–731, 33 FR 10589, published July 25, 1968, together with several other applications,[1] to inquire, *inter alia*, into the character qualifications of RNJ and Lake-River, which have majority ownership in common.[2] The Review Board subsequently enlarged the scope of the proceeding by the addition of further character qualifications issues and several technical issues raised by certain Lake-River amendments. On October 16, 1972, following release of the Initial Decision, the Broadcast Bureau filed exceptions, a supporting brief, and a request for oral argument, and, on November 1, 1972, RNJ/Lake-River filed a reply. Oral argument was held before a panel of the Review Board on September 18, 1973. In view of certain of the substantive and procedural questions in controversy before the Board, we have found it necessary to set forth some of the bases for our conclusions. However,

[1] The dispositions of five other applications also consolidated in the Order are summarized in the Initial Decision but are not relevant to the questions now before the Board.

[2] The common principals are Lawrence Tighe, Jr., and Robert Boughrum. The application for facilities at Lakewood, N.J., was pursued under the name of RNJ until an amendment changing the name to Lake-River Broadcasting Corp. was filed January 9, 1968.

we believe that the ultimate resolution by the Presiding Judge is proper and, except as modified herein and by our rulings on the exceptions contained in the attached Appendix, his findings and conclusions are adopted. The outstanding issues in dispute all relate to the character qualifications of RNJ/Lake-River.[3]

THE HACKETTSTOWN APPLICATION OF RNJ

2. The disputed issues against RNJ concern the original and continuing availability of the site specified in the RNJ application for Hackettstown. The events leading to the controversy concerning that site are, in large part, not in dispute, but will be summarized to facilitate understanding. In September or October, 1965, principals of RNJ contacted Mrs. Florence Sheldon, owner of the site in question and a licensed real estate dealer. Agreement for the lease of seven acres for $1,000 per year was reached, an option agreement was prepared by RNJ's attorney, and, on October 29, RNJ filed its application with the Commission, specifying therein Mrs. Sheldon's property as its site. On the following day, October 30, 1965, RNJ mailed the option to Mrs. Sheldon for her signature, including therewith a check for $150. After receipt of the option and check, however, Mrs. Sheldon notified RNJ in early November that she had changed her mind and, wishing to sell a total of thirty-two acres, would not sign the option. RNJ claims that she did, however, then make an oral agreement with RNJ to lease the land should it fail to find an alternative site. The Bureau disputes RNJ's claim and argues that, in fact, RNJ had no reason to believe the property would be available to it under the terms stated in the application. Subsequent to the refusal to sign the option, RNJ investigated the suitability of other sties with the assistance of Mrs. Sheldon until the latter part of November, but did not find an acceptable alternative. Apparently, there was no discussion between RNJ and Mrs. Sheldon regarding the property after that time until November, 1966. However, on May 20, 1966, Louis Vander Plate, a competing applicant at that time, drove Samuel Kaplan, his personal attorney, and Kenneth Martin, a local real estate investor, to Mrs. Sheldon's home; while Vander Plate waited outside, Kaplan, posing as an investor, secured a 90-day option to purchase the entire property Mrs. Sheldon had for sale. The following day, RNJ began test measurements on the Sheldon property, but had no contact with Mrs. Sheldon, although she knew the tests were being made. On July 20, 1966, Kaplan again visited Mrs. Sheldon and obtained an extension of the option to December 1, 1966. Vander Plate and Martin visited Mrs. Sheldon between July and early November, 1966, and, on November 15, 1966, Vander Plate and Philip Baker, his communications counsel, visited Mrs. Sheldon, at which time she learned of the Vander Plate/Kaplan scheme. Mrs. Sheldon then called Tighe and informed him of all that had transpired. Thereupon, RNJ contracted to purchase the tract and

[3] Other outstanding issues include *Suburban, de facto* control and misrepresentation of site adequacy issues. No exceptions have been addressed to the Presiding Judge's favorable resolution of these issues. The Board concurs and, therefore, no further comment regarding these issues is necessary.

by amendment filed January 4, 1967, notified the Commission that the "long-time oral understanding to lease" was being changed to an agreeemnt to buy. On February 21, 1967, Vander Plate filed a petition to dismiss the RNJ application based, in part, on the allegation that he had visited Mrs. Sheldon in November, 1966, and discovered that RNJ had no site available to it. In its response, filed March 9, 1967, RNJ contended that after her refusal to sign the option, Mrs. Sheldon orally agreed to rent the site to RNJ if no other site were found and to give RNJ a right of first refusal should she have an opportunity to sell the entire tract. Submitted with the RNJ opposition was an affidavit by Mrs. Sheldon, prepared by Tighe, confirming RNJ's claims and alleging that she was not visited in November by Vander Plate. At hearing, Mrs. Sheldon corrected the statement regarding the visit, but the Bureau argued that Tighe, knowing of the November visit, had suborned a false affidavit. In its designation Order, the Commission specified a broad issue to inquire into the conflicting allegations and to determine their effect, if any, on the qualifications of the applicants.

3. Upon review of the record and the pleadings before us, the Review Board concludes, as did the Presiding Judge, that RNJ did evidence a belief in the continued availability of its site subsequent to the filing of its application, and that the Broadcast Bureau has not shown otherwise. The fact that RNJ undertook to conduct test measurements on that property clearly indicates that it believed the land would be available should it be required. The Bureau concedes that such belief, rather than a binding commitment, is all the Commission requires of its applicants and, on the other hand, has not supported its claim that RNJ had other than that belief. We do agree with the Bureau to the extent that Martin's testimony establishes that Mrs. Sheldon did inform Kaplan of her negotiations with RNJ and did indicate that she was free to contract with other parties, although she has testified to the contrary.[4] Moreover, the remainder of Mrs. Sheldon's testimony, not directly impeached, is an aggregate of contradictory and inconsistent statements which render it wholly incredible. Rejection of her testimony, however, does not necessarily lead us to conclude that RNJ has acted in bad faith. Rather, it lends credence to the possibility that Mrs. Sheldon granted an option to Vander Plate, despite having previously assured RNJ that she would lease the property to it.[5] In brief, the Bureau has not elevated its claim above mere surmise. Finally, the Bureau also has failed to show the source of the erroneous information contained in Mrs. Sheldon's affidavit or that it was submitted to the Commission in other than good faith. The Board simply finds no substantial evidence of misrepresentations or lack of candor regarding this matter.

[4] However, Mrs. Sheldon's alleged assertion to Kaplan that she was free to contract with other parties is not inconsistent with having provided RNJ with oral assurances that she would lease the property, since RNJ does not claim that it had at that time a legally binding contract with Mrs. Sheldon.

[5] An equally plausible possibility is that there was a misunderstanding between her and RNJ.

THE LAKEWOOD APPLICATION OF RNJ/LAKE-RIVER

4. A brief chronology of this aspect of the case will facilitate an understanding of the questions now before the Board. On May 12, 1967, RNJ filed an amendment to its Lakewood application specifying property owned by Mr. and Mrs. Colin Aitken as its proposed site and changing the number of towers proposed from two to four. On January 9, 1968, the Lakewood application was again amended to reflect a change in transmitter site to property owned by E. Lipman, to change the name of the applicant from RNJ to Lake-River, to add Donald Towbin and Paul Larson as parties to the applicant, and to change the plan of financing, both as to costs and funds available. By Memorandum Opinion and Order, 15 FCC 2d 747, 14 RR 2d 1012 (1968), the Review Board enlarged the issues to encompass several inquiries with regard to these amendments. First, the Board added a generalized character issue to determine whether Lake-River "has evinced a pattern of conduct in dealing with the Commission which may be something less than the requisite candor expected of applicants for broadcast facilities." Specifically of concern to the Board was the availability and adequacy of the Aitken site specified in the May, 1967, amendment; whether Lake-River had concealed the interests of Towbin and Larson prior to the January, 1968, amendment; and whether the applicant concealed costs arising out of the changed proposals of the May, 1967, amendment. The Board also added a *de facto* control issue with respect to Towbin. Finally, the Board expanded existing financial and engineering issues to encompass inquiries into the feasibility of the Lipman site proposed in the January, 1968, amendment and the reasonableness of Lake-River's cost estimates with respect thereto. By Memorandum Opinion and Order, FCC 68R–547, 15 RR 2d 137, the Board again enlarged the issues to include an inquiry into whether Lake-River's proposal, based on field intensity measurements, would provide required coverage of the city to be served. The Bureau contends that RNJ should be disqualified under several of these issues.

5. The Bureau first submits that RNJ misrepresented the availability of the site specified in its May, 1967, amendment because the owner of the property constituting the major portion of the proposed site had told RNJ principals that the remainder of that site would be unavailable to them. The Bureau maintains, too, that, absent that plot of land, the site would be too small to accommodate RNJ's proposal. Tighe further attempted to conceal these alleged facts from the Commission, asserts the Bureau, in an affidavit stating that he had inspected the site and found it adequate. However, we agree with the Administrative Law Judge's determination that RNJ did not misrepresent the availability of the site specified in its May, 1967, amendment. A portion of the land proposed by RNJ as its second (Aitken) site is owned by the city of Lakewood by reason of tax delinquency. The major portion of the proposed site is owned by Mr. and Mrs. Aitken, who told principals of RNJ that they (the Aitkens) had been trying to buy the smaller lot from the city for several years and that the city would probably put the lot up for sale so that they could

purchase it for RNJ. The Bureau, focusing on only part of the aforementioned discussion, contends that since RNJ was informed of the city's past reluctance to sell, the applicant must have known that the smaller plot would not have been available to it. The full context of the negotiations, dealing with purchase of the land by the Aitkens and resale to RNJ, leads, however, to a contrary conclusion. While there is some doubt as to whether the Aitkens would be able to purchase the lot in question and, thus, whether part of the site proposed by RNJ would, indeed, have been available to it, it is also apparent that principals of RNJ in good faith received a contrary impression from their discussion with the Aitkens. This conclusion is buttressed by the fact that in another instance the Aitkens did successfully purchase an adjacent plot of land for resale to RNJ. Moreover, not only is there a lack of evidence to indicate otherwise, but the site absent that lot, would still be adequate for RNJ's purposes. The Bureau bases its argument to the contrary on testimony concerning limitations of the array as originally situated, while disregarding further evidence regarding adequacy of the array were it shifted slightly to the southwest. Finally, the affidavit relied upon the Bureau to show misrepresentations by Tighe did not deal with the matter here under discussion, and was a proper and accurate response to the matter to which it was addressed.

6. The Bureau also contends that prior to the amendment of January, 1968, RNJ concealed interests of parties to the application as well as certain costs, *i.e.*, those due to an increased number of towers proposed and an escrow agreement with the Aitkens. We find, to the contrary, that the record indicates that RNJ did not conceal either interests of parties to the application or costs incident to the application. Although extensive negotiations were carried out between RNJ and Towbin and Larson, we have no reason to reject the testimony that none of the parties considered the transaction consummated until Towbin and Larson finally tendered their financial contributions just prior to RNJ/Lake-River's amendment.[6] Thus, while the negotiations should have been reported earlier, no adverse conclusion with regard to the applicant's character can be drawn.[7] Similarly, while the May, 1967, amendment, which indicated an increase in the number of towers proposed, did not reflect the costs thereof, the record contains sufficient proof that this failure was due to inadvertance first noticed on August 10, 1967, by the principals, and that, subsequently, delay was pursuant to advise of counsel who believed such defect would be cured when an anticipated engineering amendment involving, *inter alia*, further financial modifications was filed. This carelessness and reliance

[6] On September 25, 1967, RNJ principals incorporated Lake-River to prosecute the Lakewood application, in contemplation of Towbin and Larson joining. In September and October, 1967, balance sheets and biographies of Towbin and Larson were prepared and, in October, stock certificates, too, were prepared but not delivered. The data filed with the Commission included these dates. In late December of 1967, Towbin and Larson made the financial contributions which were reported to the Commission in January, 1968.

[7] RNJ's statement in pleadings that the biographies of Towbin and Larson were utilized by the applicant to evaluate prospective stockholders did, in our view, constitute a dilatory tactic not totally responsive to the matter in question. However, the statement neither serves to establish that RNJ misrepresented the interests of Towbin and Larson to the Commission nor has it any independent significance which would warrant a separate character inquiry. Also see note 12, *infra*.

upon advice of counsel is not excusable, but does not warrant adverse character conclusions. We further have no reason to doubt RNJ's explanation that the amount of funds to be placed in escrow for restoration of the Aitken property upon abandonment of the site was never determined and was assumed to be insignificant.

7. The Commission designated, and the Review Board later expanded, financial, site feasibility and engineering issues against Lake-River. (See paragraph 4, *supra.*) These issues have been mooted by dismissal of the Lake-River application. However, the record, the Initial Decision and pleadings by both parties deal extensively with the question of misrepresentations made by Lake-River in connection with those issues. The Bureau claims, first, that Lake-River misrepresented funds available to meet its costs.[8] In the financial portion of the January, 1968, amendment, the Bureau argues, the applicant states that its stockholders had purchased 1,000 shares of stock for $10,000 when, in fact, only approximately $4,000 was actually paid to the corporation by the new stockholders, Towbin and Larson, and the old RNJ stockholders merely paid for their Lake-River stock by way of an equity transfer. However, the amendment specifically states that the stock subscription would be relied upon to meet the miscellaneous costs itemized under "other items" in its application, the amount listed thereunder was $4,000, and, in fact, that amount was paid in cash by Lake-River principals. Other costs were stated to be met by a loan, not by stock subscription. Thus, although the language used by Lake-River was imprecise, it does not reflect an intent to deceive the Commission.

8. The Bureau also claims that Lake-River was aware that the costs of construction on its final site (the Lipman property) were greater than stated, because part of its antenna array would have been located in a lake.[9] The Bureau claims that photographs and site plan submitted by RNJ conceal the fact that the site was partially located in the lake, that RNJ principals knew both that the depth of the lake was substantial and that their cost estimates were therefore unreasonably low, and that Robert Boughrum, a principal, attempted to conceal these facts by stating in an affidavit that the lake would be drained when also, in fact, it would later have been refilled. Our review of the record leads us to reject the Bureau's contentions. We find, first, that the pictures submitted by Lake-River with its January 9, 1968, pre-designation amendment simply do not conceal the fact that the center of its array would have been at the edge of the lake. To the contrary, these exhibits clearly establish the antenna location at the edge of the lake. We find further that testimony of Lake-River principals reflects that their estimates of the depth near shore were reasonable and made in good faith.[10] The applicant has also established to our satisfaction that its principals relied upon individuals with engineering experience

[8] The moot issue was to determine "whether the proceeds from the sale of capital stock are available in whole or in part for the purposes intended."

[9] The moot issues were to determine "the basis of the applicant's estimates of construction costs and whether the estimates are reasonable" and "whether the applicant has available sufficient funds. . . ."

[10] Testimony relied upon by the Bureau simply does not support its claims to the contrary.

in arriving at their cost estimates and, while those estimates might have proven to be erroneous under a financial issue, there is no basis for concluding that the estimates were not made in good faith.[11] The affidavit which is of concern to the Bureau is also consistent with our conclusion. In our view, Boughrum merely indicated therein his belief that costs of construction would not be increased due to the nature of its site because, during construction, draining would eliminate any such problem. Finally, we note that the Bureau, at oral argument, modified its financial calculations to conform in major respects to those advanced by RNJ, thereby reducing significantly the possibility of a motive for the alleged misrepresentation.

9. The Bureau further asserts that questions of misrepresentation arise from Lake-River's opposition to the addition of the now moot community coverage issue. In its opposition to the Bureau's petition to enlarge, Lake-River contested the Bureau's claims regarding ground conductivity at the site and argued that even were the Bureau correct, required coverage standards could be met. Tests established that, in fact, conductivity was so low and so different from the Commission's map of estimated ground conductivity (Figure M–3) that Lake-River could not place the required signal over Lakewood, and that statements in Lake-River's pleadings to the contrary were in error. The record indicates, moreover, that both Lake-River's engineering and then legal counsel were aware at the time the pleadings were submitted that there was a substantial possibility that those claims would prove to be in error. We find such pleading procedure to be unacceptable and that the claims made by Lake-River constitute exaggerations. However, since there was some basis for the claims which were advanced by the applicant's legal and engineering counsel, we cannot agree with the Bureau that in the circumstances of this case this overzealous argument is so clearly misleading as to constitute misrepresentation by Lake-River.[12]

10. Thus, the Review Board is convinced after a full examination of the voluminous and often complex record before it that RNJ and its principals have undeniably been careless in several important aspects of this proceeding, but that there is no substantial showing of deliberate misrepresentation which would support a conclusion that the applicant lacks the requisite character qualifications to be a Commission licensee. Since RNJ has been found to be qualified in all other respects, we find that the public interest would be served by a grant of its application for Hackettstown, New Jersey. Favorable resolution of the outstanding character issues warrant approval, also, of reimbursement of expenses to Lake-River pursuant to dismissal of its application for Lakewood, New Jersey.

---

[11] The Bureau also excepts to the Judge's rejection of conflicting cost estimates, tendered in hearing by a then competing applicant. The precise estimates do not affect our evaluation of the character of the applicant and, thus, we do not deem the Judge's action to be of decisional significance.

[12] In this regard, we do note that, but for what present counsel for RNJ generously terms "excessive advocacy" by prior counsel in a number of instances, substantial amounts of time could have been saved in this proceeding and certain questions of character would never have been raised.

11. Accordingly, IT IS ORDERED, That the application of Radio New Jersey (BP–16987) for a construction permit for a new standard broadcast station at Hackettstown, New Jersey, IS GRANTED; and

12. IT IS FURTHER ORDERED, That the provisions for partial reimbursement of out-of-pocket expenses between Mid-State Broadcasting Company, Somerset Valley Broadcasting Company and Lake-River Broadcasting Corp. and between Radio New Jersey and Carolyn M. Vander Plate, held in abeyance by Orders FCC 70R–46, (released February 13, 1970) and FCC 72M–332, (released March 14, 1972),[13] respectively, ARE APPROVED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK,
Member, Review Board.

APPENDIX

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU

Exception No.	*Rulings*
1	Granted.
2	Denied. The findings are adequately supported by the record. See paragraph 3 of this Decision.
3, 4	Denied, for the reasons (a) that the exceptions are in violation of Section 1.277(a) of the Rules, which requires "specific references to the page . . . of the transcript [or] exhibit . . . on which the exception is based" and (b) as unsupported by the record. See paragraph 3 of this Decision.
5	Granted.
6	Denied, as unsupported by the record. See paragraph 5 of this Decision.
7	Granted. However, see paragraph 5 of this Decision.
8, 9, 10	Denied. The findings are adequately supported by the record and relevant to the issues under consideration. See paragraph 5 of this Decision.
11	Denied. The Judge's findings (paragraph 46) adequately reflect Pauley's entire testimony concerning the issue. See paragraph 5 of this Decision.
12	Granted.
13	Denied. The findings are fully supported by the record. Nor does the record, itself, establish the motive suggested by the Bureau. See paragraph 6 of this Division.
14	Denied. The Judge properly found (paragraph 53) that Lake-River's amendment did reflect the nature of its proposed site. See paragraph 8 of this Decision.
15	Denied. The Judge's findings are fully supported by the record evidence. See paragraph 8 of this Decision.
16	Denied, as being of no decisional significance.
17	Granted to the extent indicated in paragraph 9 of this Decision, and *denied* in all other respects as being unsupported by the record evidence.
18	Denied. The findings excepted to are supported by the record. See paragraph 9 of this Decision.
19	Denied, as being of no decisional significance. See note 11 of this Decision.

[13] The dismissal agreement between RNJ and Vander Plate provided partial reimbursement to Vander Plate in the event RNJ's application were granted. The Judge held such provision in abeyance in his Order granting dismissal.

Exception No.	*Ruling*
20, 21	Denied. The Judge's findings are supported by the record; the proposed findings are not so supported. See paragraph 6 of this Decision.
22, 25	Denied. The findings are fully supported by the record. See paragraph 6 of this Decision.
23	Granted. However, see paragraph 7 of this Decision.
24	Denied, as unsupported by the record. See paragraph 7 of this Decision.
26, 27, 28, 29	Denied. (a) Those exceptions which would have us adopt extensive excerpts of the Bureau's proposed findings and conclusions do not comply with Section 1.277(a) of the Rules. *WSTE-TV, Inc.*, 33 FCC 2d 438, 23 RR 2d 573 (1972). See also *Daily Telegraph Printing Co.*, 36 FCC 2d 4, 24 RR 2d 877 (1972) and *Coral Television Corp.*, 29 FCC 2d 266, 21 RR 2d 1114 (1971). (b) These exceptions would also be denied as being unsupported by the Record. See paragraphs 3, 5, 6, 7, 8 and 9 of this Decision.
30	Denied. The circumstances alleged do not support an adverse character finding. That a principal stated, with regard to a now moot public files availability issue, that the files would be available at an additional location besides the one specified in the newspaper publication when, in fact, the files were not available at that second place does not warrant disqualification on character grounds. The statement, as acknowledged by the Bureau, has no independent significance and we do not find any attempt, or motive for attempting to mislead.
31	Denied. The conclusion is adequately supported by the record; the proposed conclusion is not so supported. See paragraph 10 of this Decision.
32	Denied for the reasons stated in the whole of this Decision.

F.C.C. 72D-58

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO NEW JERSEY, HACKETTSTOWN, N.J. For Construction Permit	Docket No. 18252 File No. BP-16987

APPEARANCES

Philip M. Baker, on behalf of Louis Vander Plate; *Samuel Miller*, on behalf of Mid-State Broadcasting Company; *Robert A. Marmet*, on behalf of Arthur S. Steloff; *Peter Shuebruk*, on behalf of Seashore Broadcasting Co., Inc.; *Alan Y. Naftalin*, on behalf of Somerset Valley Broadcasting Company; *Lauren A. Colby* and *Eugene F. Mullin, Jr.*, on behalf of Radio New Jersey and Lake-River Broadcasting Corp.; and *Richard M. Riehl*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER MILLARD F. FRENCH

(Issued August 28, 1972; Released August 31, 1972)

PRELIMINARY STATEMENT

1. By order released July 22, 1968, the Commission designated for consolidated hearing seven applications for standard broadcast stations, two for 1000 kHz and five for 1170 kHz. The consolidation of these two distinct groups of applications was made necessary because of unresolved character qualifications questions raised as the result of predesignation pleadings. The applications directly involved were Radio New Jersey for Hackettstown, New Jersey, on 1000 kHz, and Lake-River Broadcasting Corp. (Docket No. 18256) for Lakewood, New Jersey, on 1170 kHz, with common majority stockholders.

2. Subsequent to the release of the designation order, numerous interlocutory pleadings were filed, some causing the issues to be enlarged and others effecting dismissal and/or grant of five of the original applications in this proceeding. These five applications and the orders causing their removal are as follows:

(1) By order adopted March 11, 1969, the application of Arthur S. Steloff (Docket No. 18254) was dismissed and that of Seashore Broadcasting Co., Inc. (Docket No. 18255) was granted.

(2) By order adopted February 12, 1970, the applications of Mid-State Broadcasting Company (Docket No. 18253) and Somerset Valley Broadcasting Company (Docket No. 18257) were severed from this proceeding and granted, and the applica-

tion of Lake-River Broadcasting Corp. (Docket No. 18256) was dismissed.

3. Thus, the only applications that remained in this proceeding were those of Louis Vander Plate for Franklin, New Jersey (hereinafter Vander Plate) and Radio New Jersey for Hackettstown, New Jersey (hereinafter Radio New Jersey), both applying for 1000 kHz and determined by the Commission in the designation order to be mutually exclusive.

4. Hearing sessions with respect to the foregoing applicants were held on December 16–18, 1968; January 27, 1969; April 8–11, 14–16, 1969; October 6 and 8, 1969; November 5–7, 1969; December 8, 1969; March 17 and 18, 1970; April 28, 1970; May 7, 1970; July 16, 1970; and June 2, 1971. On the latter date the record was closed.

5. After the filing of proposed findings and conclusions had been completed on September 3, 1971, the following events took place. On November 14, 1971, Louis Vander Plate died and the record was reopened on November 24, 1971. Carolyn M. Vander Plate, the widow of Louis Vander Plate, filed a petition on December 13, 1971 seeking leave to amend the application by substituting herself as Administratrix of the Estate of Louis Vander Plate, which said petition was granted December 15, 1971. On December 21, 1971, Carolyn M. Vander Plate and Radio New Jersey filed their "Joint Request for Approval of Agreement Pursuant to Section 1.525; Petition to Dismiss Application." By order released March 14, 1972, the above petition was granted: the agreement was approved but action on the reimbursement provision in the agreement was held in abeyance pending the outcome of a decision as to the character qualifications of Radio New Jersey; the Vander Plate application was dismissed; the Radio New Jersey application was retained in hearing; and the record was closed.

6. The only issues remaining after the foregoing events occurred are the following:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

* * * * * * *

5. To determine whether, at the time of the filing of the applications of Radio New Jersey for construction permits for stations in Hackettstown and Lakewood, New Jersey, there was reasonable assurance that the antenna sites proposed in both applications were available for the use then proposed.

6. To determine the facts and circumstances with respect to the efforts made to secure the aforementioned sites and the facts and circumstances with respect to the ensuing controversy and their effect on the requisite and comparative qualifications of Louis Vander Plate, Radio New Jersey, and Lake-River Broadcasting Corp. to receive a grant of their respective applications.

7. To determine the efforts made by Louis Vander Plate, Radio New Jersey and Arthur S. Steloff to ascertain the community needs and interests of the respective areas to be served and the means by which the applicants proposed to meet those needs.

* * * * * * *

14. To determine all the facts and circumstances surrounding the filing of amendments to BP–17485 dated May 12, 1967 and January 9, 1968 and in the light of the evidence adduced thereunder, whether Lake-River Broadcasting Corp. possesses the requisite and/or comparative qualifications to receive a grant of its application.

15. To determine the nature and extent of the interest held by Donald Towbin in Lake-River Broadcasting Corp. in the light of his stock ownership and loan commitment; and in the light of the facts adduced thereunder, whether he has *de facto* control of Lake-River Broadcasting Corp.

* * * * * * *

17. To determine whether Lake-River Broadcasting Corp. has had a copy of its application available for public inspection as required by Section 1.594 of the Rules.

18. To determine, in light of the evidence adduced under the foregoing issue, whether the Lake-River application should be dismissed or a comparative demerit assessed.

7. Issues 14, 15, 17 and 18, above, relate to Lake-River Broadcasting Corp. but they are involved in this decision because some of the principals in Radio New Jersey were also principals of Lake-River, and because the Review Board held in abeyance the question of whether Lake-River can receive reimbursement of $4,000 in expenses from two of the other 1170 kHz applicants, pending resolution of the qualifications issues in this proceeding.

FINDINGS OF FACT

Issue 1—Areas and Populations Served

8. According to the 1960 U.S. Census, and the record in this case, Hackettstown, New Jersey, is a city of 5,276 persons, located in Warren County (population 63,220), some 30 miles west of Newark and 21 miles southwest of Franklin. Hackettstown is not a part of any urbanized area. The only broadcast facility in the community is a noncommercial educational FM station, WNTI (90.9 MHz, 5.6 kw/510 ft., Class E). Official notice has been taken of the fact that in the 1970 U.S. Census, Hackettstown and Warren County are listed as having populations of 9,472 and 73,879, respectively.

9. Based on radiation values from the proposed directional antenna pattern used in conjunction with ground conductivity values from Figure M–3 of the Rules except in the directions 183, 290.5, 310.5 and 330.5 degrees true where field intensity measurements on a test transmitter at the proposed site were utilized, the proposed station would provide a primary service to 196,483 persons in 2,239.5 square miles. Six stations provide primary service of 0.5 mv/m or greater to all the rural areas proposed to be served and another 27 stations serve portions of such area. Altogether, these stations make available at least seven AM services in any one part of the proposed rural service area.

10. The following table lists the urban places that would be served

in whole or in part by the proposed station and the availability of other aural services in each of the communities:

Community	Population	Other services
Hackettstown, N.J.	5,276	AM: WABC, WOR, WNBC, WCBS. FM: WFME, WGPA.
Belvidere, N.J.	2,636	AM: WABC, WOR, WNBC, WARM, WEEX, WVPO. FM: WFME, WGPA, WEST, WEEX.
Hopatcong, N.J.	3,391	AM: WABC, WOR, WNBC, WCBS, WNEW, WNNJ (50%). FM: WFME, WDHA, WVNJ.
Lake Mohawk, N.J.	4,647	AM: WABC, WOR, WNBC, WCBS, WNEW, WNNJ. FM: WRNW, WVIP, WLVP, WFME, WVNJ.
Netcong, N.J.	2,765	AM: WABC, WOR, WNBC, WCBS, WNEW. FM: WDHA, WVNJ, WFME.
Newton, N.J.	6,563	AM: WABC, WOR, WNBC, WNNJ. FM: WFME, WLVP, WRNW, WVIP.

Issue 5—Availability of the Hackettstown and Lakewood Transmitter Sites

11. This issue inquires as to whether, at the time Radio New Jersey filed its applications for Hackettstown and Lakewood, New Jersey, there was reasonable assurance that the proposed antenna sites were available for such use at the time of the filing of such applications. Issue 5 is limited in scope and is confined to the availability of the "Sheldon site" in Hackettstown and the "Heterbrugge site" in Lakewood at the time the applications were filed. The pertinent dates involved are October 29, 1965, when the Hackettstown application was filed, and October 26, 1966, when the Lakewood application was filed. To some extent, this issue overlaps, and is involved in, Issue 6, which calls for a broader inquiry into the facts and circumstances surrounding these sites and the controversy involved.

THE HACKETTSTOWN OR SHELDON SITE

12. In September or October 1965, Lawrence J. Tighe, Jr. and Benjamin J. Friedland, who had at the time a one-third interest in Radio New Jersey, were looking for property near Hackettstown to specify as the site of their proposed station. They called at a local real estate office to inquire about leasing a particular piece of property and were told that it was owned by Mrs. Florence Sheldon, who was a real estate saleswoman associated with that office. Although Mrs. Sheldon preferred not to break up her land, she did agree to give them an option to lease seven acres of her property for an annual rental of $1,000, reserving to herself the right to sell the property, but giving Radio New Jersey the right of first refusal. Tighe and Friedland agreed to have the necessary papers prepared by Friedland's attorney. On October 12, 1965, Friedland wrote Mrs. Sheldon a letter returning the survey that she had given them, stating that, "Within the next few days we will contact you to approve the option." On October 20, 1965, Radio New Jersey's attorney in Newark sent Mrs. Sheldon a survey showing the area of the proposed option (about seven acres) and asking her to send him a legal description of the land, or a copy of her deed, and also the name and date of death of her late husband. He then prepared

an option agreement which precisely described the property to be leased, cited the book and page number in the county land records where Mrs. Sheldon's deed was recorded, gave her husband's name and date of death and recited the fact that she had not remarried. The agreement provided that, in consideration of an option price of $150, Radio New Jersey would have the right to lease the property at any time within two years at an annual rental of $1,000. The agreement also provided that she retained the right to sell the property subject to an option to Radio New Jersey to have "the first right to purchase the said real estate for the same price and upon the same terms and conditions of such bona fide offer made as I am willing to accept." Mrs. Sheldon was also mailed a check for $150, dated October 30, 1965. In the meantime, Radio New Jersey had filed its application on October 29, 1965, relying on Mrs. Sheldon's assurances that her land was available to them on a lease basis.

THE LAKEWOOD OR HETERBRUGGE SITE

13. When Radio New Jersey filed its Lakewood application on October 26, 1966, it proposed as an antenna site certain property near Lakewood owned by a man named Heterbrugge. Jay Kaplan, a Lakewood realtor, testified that on January 15, 1966, Mr. Heterbrugge came into his office to list for sale property he owned in Manchester Township, about six miles west of Lakewood. It was an unimproved piece of land consisting of approximately 5¼ acres. Mr. Heterbrugge set a price of $7,500 for the entire tract. At the time of the listing, Jay Kaplan also obtained Heterbrugge's permission to post a "For Sale" sign on the property, and that sign remained on the property until approximately December 1966.

14. In September or October of 1966, Radio New Jersey's principals called at Jay Kaplan's real estate office in Lakewood. They told Jay Kaplan what they wanted, and he produced several listing cards, one of which was the listing of the Heterbrugge property. After examining the property, Radio New Jersey advised Jay Kaplan that they wanted it. They asked him to try to obtain a two-year option to purchase the property at the listed price, or to lease it. Jay Kaplan testified that he told them the listed price, $7,500, that they agreed to that price, but that he advised them that he would have to find out whether or not Heterbrugge would agree to a two-year option at that price.

15. Jay Kaplan was unable to reach Heterbrugge until several days later and Heterbrugge said that if he had to give an option for two years he wanted more than the listed price of $7,500; he then fixed a new price of $9,500. Jay Kaplan communicated this to Radio New Jersey, and a few days later he was told that the new price was acceptable. This was passed on to Heterbrugge, and after considering it for a few more days, Heterbrugge told Jay Kaplan that he was not too sure he wanted to sell at $9,500 and asked if Jay Kaplan thought he might get $11,000 for it. He added that if he could not get $11,000, he was thinking of taking it off the market entirely. Radio New Jersey considered this new price for several days and then told Jay Kaplan

it was acceptable. After a few more days of pondering, Heterbrugge told Jay Kaplan that he had changed his mind about selling the property and wanted it taken off the market. Radio New Jersey then made a final offer through Jay Kaplan of $13,000, but it was rejected. Friedland then attempted to pursue the matter directly with Heterbrugge by telephone, but to no avail. Tighe also attempted to talk to him, but Heterbrugge refused to discuss the matter, and the property has been off the market ever since.

16. The record reveals that after accepting the first escalation of the price, Radio New Jersey assumed that it had the assurance of a two-year option to buy the property. On the basis of their acceptance of the listed price, Radio New Jersey's principals authorized their consulting engineer to prepare an application, and on the basis of their acceptance of the first escalation of price they completed and filed the application. When the price escalated again, they agreed to it, and when the property was finally withdrawn from the market they offered a price almost double the original listed price and then attempted to persuade the owner to change his mind. By this time, it was mid-November, and on November 18, 1966 they advised the Commission that negotiations had broken down and the proposed site was no longer available.

Issue 6—The Controversy Involving the Sheldon and Heterbrugge Sites

17. This issue calls for a broader inquiry into the facts and circumstances surrounding the above-named sites and the controversies involving the same. It had its genesis in the filing of a "Petition to Dismiss Application or in the Alternative to Designate Issues in a Consolidated Proceeding" filed by Vander Plate on February 21, 1967. In responsive pleadings, charges and countercharges were exchanged. As a result, the Commission directed that a full inquiry be made into this controversy in order to determine whether representations made to the Commission by either Louis Vander Plate or Radio New Jersey would adversely affect their qualifications to be a licensee. It should be noted that the application for Lakewood was originally filed by Radio New Jersey. Subsequently, a new corporation, Lake-River Broadcasting Corp., succeeded to this application. However, majority control remained unchanged.

THE SHELDON SITE (HACKETTSTOWN)

18. It is stating it mildly to say that some of the testimony of the witnesses in this proceeding is in irreconcilable conflict. One example, at this point, will suffice to illustrate such conflict. Four witnesses testified regarding the number of visits paid to Mrs. Sheldon between May and November 1966 regarding the interest, if any, that Radio New Jersey had in her property. Vander Plate testified, in part, that Mr. Kenneth Martin made one visit alone, one visit with Mr. Samuel Kaplan and one visit with Mr. Vander Plate. Martin had no recollection of a visit prior to the time he and Mr. Kaplan saw Mrs. Sheldon. Mr. Vander Plate stated he and Martin saw Mrs. Sheldon in

104-019—74——5

November 1966. Martin and Mrs. Sheldon believed it was in the summer. Mrs. Sheldon originally believed a November meeting between Vander Plate, his attorney, and her had occurred earlier because the weather was so warm. No attempt will be made at this juncture to resolve the many conflicts that exist, and, generally, the testimony of all witnesses in the proceeding, taking into account the transitory nature of recollection, have been accorded equal weight in the following paragraphs.

19. Between the time Mrs. Sheldon orally agreed to lease seven acres of her land to Radio New Jersey as detailed in paragraph 12, *supra*, and her receipt of the written agreement and check, she changed her mind. This change in mind was brought about by the fact that land values were increasing and she didn't want to tie her property up for such a long time, and because taking the seven acres out of her total holding of thirty-two acres might impair her ability to sell the remainder. Within a few days following receipt of the agreement and check, Mrs. Sheldon notified Radio New Jersey that she would not sign the agreement, but would extend an oral lease option in lieu thereof. She also refused an offer from Radio New Jersey to buy the seven acres in which they were interested. She did, however, agree orally that if she received an offer to purchase her entire tract during the term of the oral lease option, she would notify Radio New Jersey and give them the opportunity to buy the property on the same terms as offered. Radio New Jersey told Mrs. Sheldon they would attempt to seek another site and she agreed to help them. In fact, Mrs. Sheldon showed them two or three other pieces of property in November 1965, but thereafter heard no more from Radio New Jersey, except for one phone call in March 1966, until November 1966. Even though they had advised Mrs. Sheldon they would attempt to seek a new site, Radio New Jersey stopped looking after November 1965.

20. In the spring of 1966, Kenneth Martin, a real estate investor in the Franklin, New Jersey, area, stopped by Mr. Vander Plate's WLVP–FM studios and spoke to him regarding property adjoining the station site. During the course of the conversation, Martin mentioned that there was property for sale in Hackettstown, opposite the M & M Candy Company, which would make a good antenna site. Vander Plate knew that the property specified by Radio New Jersey was in this area and became interested. As it turned out, Martin was talking about some property other than Mrs. Sheldon's. However, he believes he may have told Vander Plate that Mrs. Sheldon also had property for sale in the area. Following this conversation, Martin agreed to go to Hackettstown with Vander Plate and his attorney, Samuel Kaplan, to determine if the Sheldon property was that specified by Radio New Jersey and to confirm that it was for sale. According to Vander Plate, he and Martin drove to Hackettstown on the day they met and Martin confirmed from Mrs. Sheldon that her property was that specified by Radio New Jersey and that it was for sale. However, Martin had no recollection of this visit.

21. On May 20, 1966, Vander Plate drove Martin and Samuel Kaplan to Mrs. Sheldon's home. They walked around the property and then

Martin and Kaplan went in and spoke to Mrs. Sheldon. She confirmed that Radio New Jersey was interested in her property and that she had let them specify her property as a site in an FCC application. She stated she had no written agreement with them, but had given them permission to specify her property in the application and to conduct tests, and that she was helping them look for other property for their antenna site.

22. The foregoing meeting took approximately an hour, including negotiations over the price and the amount to be given for the option. Mrs. Sheldon then gave Mr. Samuel Kaplan a ninety-day option on the entire 32-acre tract, excluding the 4.5 acres on which her house was situated. There were three persons present on May 20, 1966 when the option agreement was signed—Mrs. Sheldon, Samuel Kaplan and Kenneth Martin. All three testified in this proceeding, and, again, their testimony is in conflict.

23. According to Martin's testimony, Samuel Kaplan represented himself not as a lawyer but as a real estate operator interested in various enterprises. Kaplan asked Mrs. Sheldon if her property was for sale, and when she replied yes, he asked her if she had any agreement with anyone else for the lease or sale of her property. Martin stated that Mrs. Sheldon then said that she didn't have any legal agreement with anyone but that she had had negotiations with Radio New Jersey, and she produced a map of the property showing the land that Radio New Jersey was holding under option, although she said that that option was not a written option. It was Martin's impression that Mrs. Sheldon had given Radio New Jersey, at least inferentially, an oral option on her property, and it was further his opinion that she did not follow normal real estate practice in failing to notify Radio New Jersey before signing the option agreement with Samuel Kaplan.

24. Samuel Kaplan's testimony is to the effect that after much bargaining Mrs. Sheldon and he agreed to a price of $85,000 for the land and $100 for the three-month option. He did not intend to purchase the land, or exercise the option, but, acting on instructions from Vander Plate, he was seeking to show that Radio New Jersey did not have an antenna site. Mr. Kaplan stated that, after the price terms had been negotiated, he asked Mrs. Sheldon specifically if she had any agreements with applicants for a radio station and that she said "'No; there were some fellows here, but we never had any agreements.' And she got up * * * and she was looking for something and didn't show it to me; she said, 'I have these agreements, and these fellow made the application' * * *." He further stated, "On May 20 * * * I went into that—whether there [were] any agreements—because that was the function for me being there actually; I inquired and she answered me that the two men had made an application, she knew they had made, made the application, but she had no agreements with them, none whatsoever. She also said that she was trying to get them another location." And at another point in the testimony Mr. Kaplan stated, "She got up at that time, went to some piece of furniture, was looking, and did come out with something, but it was never shown to me, and said, 'I have no agreements whatsoever, noth-

ing in writing with them,' and that they had used her site for the application."

25. Mrs. Sheldon's testimony with respect to the May 20, 1966 meeting was that she was concerned about fixing dinner for the eight guests in her home. She also stated that she had not heard from Radio New Jersey for six months and, therefore, assumed that they had located a new site and were no longer interested in her land. She further stated that she had completely forgotten about it when she signed the option for Mr. Kaplan. Mrs. Sheldon denied that Samuel Kaplan asked her whether her property had been specified as the site of a radio transmitter, but, in light of Mr. Martin's testimony, she was mistaken when she made this statement.

26. On May 21, 1966, the day after Kaplan obtained the option, Radio New Jersey began making test measurements on Mrs. Sheldon's property which included setting up a test transmitter. Although Mrs. Sheldon went to New York on May 21, she returned before the tests were completed. She did not speak to anyone at the test site, although principals of Radio New Jersey were there conducting the tests. At the time Radio New Jersey conducted these tests, Mrs. Sheldon believed they were no longer interested in her property. It was her understanding that these tests could be conducted anywhere in the Hackettstown area. Thus, she didn't advise the principals of Radio New Jersey during the week of May 20, 1966 that she had given Samuel Kaplan an option on her property.

27. On July 20, 1966 Samuel Kaplan returned to Mrs. Sheldon to obtain an extension of the option to December 1. His reason for obtaining the extension was because the original option agreement did not contain specific language regarding the existence of any oral or written agreements. Mr. Kaplan wrote out the extension on the back of the original option agreement and Mrs. Sheldon signed it. The option extension contained the following language:

July 20, 1966

I do extend the within option until Dec. 1, 1966. There are no contracts, leases, oral or written to sell or lease this property to anyone else.

Before having Mrs. Sheldon sign the extension, Mr. Kaplan testified that he had asked if there were any oral agreements, etc., and she said no. He then prepared the extension, read it to her and had her read it herself before she signed. On the other hand, Mrs. Sheldon denies that the sentence, "There are no contracts, leases, oral or written etc." quoted above, was on the option extension when she signed it and states that this language was inserted in the document after she signed it. She also testified that when she went to get her copy so the same thing could be put on it, Mr. Kaplan said that "isn't necessary."

28. After Mrs. Sheldon gave the option extension on July 20, 1966, two or three visits were made to Mrs. Sheldon by Vander Plate, the last of which was on November 15, 1966. He was accompanied by his Washington communications counsel, Philip Baker, on the latter visit. The Baker-Vander Plate visit caused Mrs. Sheldon to become concerned. She called Larry Tighe, Jr., the president of Radio New Jersey, and informed him of all that had transpired, including the Baker-Vander Plate visit. Thus, Radio New Jersey was first made aware of

all that had transpired with respect to their proposed antenna site about the middle of November 1966. Thereupon, Radio New Jersey immediately made arrangements to purchase Mrs. Sheldon's property after the Kaplan option terminated. On December 1, 1966 the Kaplan option expired by its own terms. The purchase agreement between Mrs. Sheldon and Radio New Jersey was executed on December 10, 1966, and reconfirmed on February 2, 1967.

29. Mr. Vander Plate testified that he never had any intention of exercising the option or of depriving Radio New Jersey of their transmitter site. This was also the understanding of his attorney, Samuel Kaplan. Mr. Vander Plate believed, after learning that the property specified by Radio New Jersey was for sale, that the only absolute way of showing the Commission that Radio New Jersey, in fact, had no site was to obtain an option on it. However, on February 21, 1967, Mr. Vander Plate filed a "Petition to Dismiss Application or in the Alternative to Designate Issues in a Consolidated Proceeding," based, in part, on the allegation that Radio New Jersey, at the time it filed its application, had no site available to it. The pleading recites, in part:

> 6. Mr. Vander Plate during the Summer of 1966 interviewed Mrs. Florence Sheldon, the owner of the land specified in the application of Radio New Jersey. Mrs. Sheldon advised Mr. Vander Plate that she had entered into an option with Mr. Samuel Kaplan of 36 Washington St., Paterson, New Jersey, to sell him her property. Thereafter, Mr. Vander Plate contacted Mr. Samuel Kaplan who confirmed the fact that he had entered into an agreement with Mrs. Sheldon to purchase her property.

As the foregoing findings reflect, this is neither an accurate nor candid statement regarding the Vander Plate investigation or the manner in which the Kaplan option was obtained.

30. In its response filed on March 9, 1967, Radio New Jersey denied the allegations and stated that it had at all times an oral option to lease the seven acres from Mrs. Sheldon. In addition, Larry Tighe, Jr. caused an affidavit to be prepared for the signature of Mrs. Sheldon. This affidavit stated, in part: (1) that Mrs. Sheldon had given Radio New Jersey an oral option to lease her property; and (2) that Mr. Vander Plate had not visited Mrs. Sheldon in November 1966.

31. Between the time Radio New Jersey filed its application in October 1965, and the filing of the Vander Plate "Petition," the application had been amended five times. In the first four they represented that they would lease the Sheldon property and in the fifth, filed January 4, 1967, it was recited that they had had a long time oral understanding to lease the Sheldon property but now were going to buy it. Testifying on April 9, 1969, Mrs. Sheldon described the current situation as: "I have an agreement, a legal document to purchase the property, the entire 32 acres" with Radio New Jersey.

THE HETERBRUGGE SITE (LAKEWOOD)

32. The facts involving this site have been principally discussed hereinbefore in paragraphs 13 through 16. The only additional findings that need be detailed are the facts that gave rise to the issue.

33. In late October or early November 1966, at the time of Vander Plate's visit to Mrs. Sheldon with Martin and after confirming his

belief that Radio New Jersey had no site in Hackettstown, he decided to check and see if the same situation existed with respect to Radio New Jersey's Lakewood application. He drove to Lakewood, checked the tax office as to the owner of the property and then got in touch with Mr. Heterbrugge. During this period, Vander Plate's inquiries of Heterbrugge included a personal visit and a telephone call by him and a telephone call by his attorney to Heterbrugge while he was present. According to Mr. Vander Plate, Heterbrugge stated he had never given anyone permission to specify his property as a transmitter site; he had met no one from Radio New Jersey; and he had received a telephone call asking whether he was interested in selling or leasing his property and he had said no. Based on this information, the allegation that Radio New Jersey did not have a reasonable assurance for their site in Lakewood was also included in Vander Plate's February 21, 1967 "Petition to Dismiss, etc." Radio New Jersey, in their responses, denied the allegation.

Issue 7—Ascertainment of Community Needs

34. Hackettstown itself, the immediate area within five to seven miles of Hackettstown, and a wider area within ten to twelve miles of Hackettstown are the major communities or areas that Radio New Jersey principally undertakes to serve. Surveys were conducted in January and February 1970 and May 1971 and were based on pertinent demographic data. The January 1970 survey reported on 47 contacts in the immediate Hackettstown area, 34 of them by principals. The February 1970 survey contained reports of 18 additional interviews conducted by Radio New Jersey's vice president, Robert H. Boughrum, in order to ascertain needs and problems in the area surrounding Hackettstown.

35. During the period May 11–13, 1971, Mr. Boughrum personally interviewed the following community leaders:

William Hobokan, Mayor of Hackettstown
Charles S. Keister, Superintendent of Schools, Hackettstown
Charles O. Eldridge, Administrator, Hackettstown Community Hospital
Frank Stramaglia, Businessman and Insurance Agent
Reverend Roger K. Swanson, Pastor, Trinity United Methodist Church, Hackettstown
Reverend Clarence W. Sickles, Executive Director, Heath Village in Washington Township (Morris County)
Reverend Thomas P. Armour, Pastor, Gethsemane Lutheran Church, Hackettstown
James Miller, Business Manager, Hackettstown Board of Education
Adeline Gaisler, Office Staff, Hackettstown Community Hospital
John Chamberlain, Principal, Washington Street School, Hackettstown
Joe Richard, Executive Director, Hackettstown Municipal Utilities Authority
Guy Bramon, Vice President, Panther Valley (residential community, Allamuchy Township)

Frank DeLello, Member, Warren County Board of Taxation
Frank Fowler, Part Owner, Triumph Machinery Co., Hackettstown
Edward Becker, Vice President, Manufacturing, M&M/Mars Candies, Hackettstown
Leonard M. Fiedler, Warren County Surrogate
Harold Frantz, Mayor, Allamuchy Township
Barry L. Gardner, Warren County Counsel
Frank Cruts, Committeeman, Mansfield Township
Edward Fuersich, Committeeman, Independence Township
Miriam Hemmendinger, Principal Probate Officer, Warren County
Harry J. Snyder, County Clerk, Warren County
Homer Bryant, Director, County Welfare Board
William Weischedel, Mayor of Stanhope Borough (Sussex County)

36. The aforesaid interviews revealed the following problems and needs:

Better communications among the people and between people and government.
A hired town manager in Hackettstown.
A hospital and additional funding for same.
Better and more efficient planning techniques.
Lack of sewers.
A juvenile detention home and improved facilities for psychiatric treatment of children.
A new town hall in Allamuchy.
Adequacy and efficiency of the school system.
The Washington Street Elementary School needs replacement or refurbishing.
Better evening adult education programs.
Better utilization of school facilities during non-school hours.
Better Centenary College-community public relations is needed.
Mansfield, Independence and Allamuchy Township High Schools need to build their own facilities.
The county schools may not be providing a sufficient challenge to the children.
Insufficient summer job opportunities for young people.
More industry is needed in Hackettstown and the surrounding area.
There is tension, even ill will, between the long-established Main Street merchants in Hackettstown and the new shopping center which is drawing a large number of customers.
Too much traffic congestion in Hackettstown.
Shortage of housing for new workers.
Water and stream pollution, almost none about air pollution. The pollution problem has come to the forefront of public interest because of the closing of the public swimming area in the Musconetcong River, which in turn has created a need for a community swimming pool.
Inadequate garbage and trash collection and disposal.

The public transportation system is wholly inadequate.
There is widespread concern about drugs and drug abuse.
There is a need for improved recreational facilities, especially for children, but also for older people.

37. Radio New Jersey also arranged for Mrs. Betty Fowler to conduct a survey of members of the public in Hackettstown. Mrs. Fowler completed 23 interviews, including both men and women, persons of various occupations, retired persons, one Negro and persons active in community affairs.

38. The needs and problems revealed by these general public interviews were the following:

Taxes are too high.
The town needs more unity.
There is inadequate coverage of local news and issues.
There is some dissatisfaction with municipal and utilities services.
There is too much traffic congestion.
Schools are a matter of concern (but there is no apparent consensus about any particular problem).
There is a need for summer jobs for teenagers.
The town needs more industry.
More housing is needed for middle-income people.
Public transportation facilities are inadequate.
Drug use is a matter of deep concern.
Public recreation facilities are inadequate.
Municipal services and utilities need improvement.

39. Radio New Jersey has devised the following programs to serve the needs of the area ascertained in its surveys:

Open Wire, Monday through Friday, 12:10–12:25 p.m. This will be a live telephone interview, public participation, public affairs program. Its concept has been expanded as a result of the 1970 and 1971 surveys so that it is now planned that it will customarily and usually be longer than 15 minutes. Members of the public will call in and give their opinions on questions of the day posed by a moderator. All telephone calls will be screened and no one will be permitted to utilize the station's facilities without identifying himself. Additionally, a "delay tape" will be utilized so that any offensive, indecent or improper remarks can be shut off. Callers will be screened so as to get a representative cross section of opinion on the issues being discussed. Civic officials, heads of charities and service clubs, and representatives of churches, schools, etc. will be invited to appear on the program to answer questions phoned in by the listening audience on subjects relating to the guests' fields of interest.

Community Forum, Saturday, commencing at 12:10 p.m. Following the May 1971 survey, it was decided that this program could customarily and usually be one hour or 90 minutes in length and that it would usually be rebroadcast on Sunday. Problems in the Hackettstown area such as transportation, new hospital, narcotics addiction, poverty, etc. will be discussed by town, county and state officials as well as the public. Approximately one pro-

gram a month will be devoted to problems of particular concern to an outlying area.

Teen Talk, Saturday, 2:10 to 2:25 p.m. This program would not be limited to school-oriented subjects, but its content and concept would be expanded to include discussions of teenagers' relations with the total community. Following the February 1970 survey, Radio New Jersey concluded that *Teen Talk* would be used from time to time (approximately once a month) to cover needs and problems of teenagers and their relation to the community in the outlying area.

Community Bulletin Board, Monday through Saturday, 7:30 a.m., 8:30 a.m., 12:30 a.m., 4:30 p.m. and 5:30 p.m. It will consist of announcements of civic events occurring in Hackettstown and the surrounding communities, such as concerts, festivals, meetings of civic organizations, public hearings by zoning boards, city councils, etc., school events of all kinds, church socials, other church activities, and any other information of a civic nature. The station will maintain close liaison with local civic officials and organizations and encourage information to be phoned or mailed in for the program. Although one-minute programs will be typical, the program's length will be somewhat flexible, depending upon the amount of material which is available.

Town Council Meetings, second and fourth Monday evenings of each month. Radio New Jersey decided after the May 1971 survey to cover town council meetings, recording them if possible, and playing back the highlights on the next day's newscasts.

Morning Devotional, five minutes per day at sign-on time. The station will tape-record a series of devotional messages prepared by local clergymen, and one such message will be broadcast each day at sign-on time.

Morning Markets. Monday through Friday, five minutes in length, following *Morning Devotional*. Market information will be gathered from the station's news service wire and supplemented by information on local New Jersey markets, including information on the overall agricultural situation in Warren County and surrounding area. Radio New Jersey intends to continue to maintain contact with the County Agricultural Agent and the County 4–H Agent in order to keep informed of agricultural needs and interests. Noon markets will be broadcast also at 12:25 p.m.

Speaking of Schools, Monday through Friday, 4:31 to 4:36 p.m. This recorded program, prepared by the New Jersey Education Association, is valuable year round and features news of school activities of interest both to students and their parents.

Stock Market Report, Monday through Friday, 11:55 a.m. At present, there is virtually no way to get current stock market information in Hackettstown at mid-day except by telephoning brokerage houses, which are normally very busy at that time. This program resulted from a suggestion made by a local stockbroker.

Evening Vesper, five minutes per day prior to sign-off. This will be similar to the morning religious program. A five-minute vesper, prepared by a local clergyman, will be broadcast prior to sign-off

each evening. Clergymen will be rotated so that all may participate.

Church of the Week, Sunday, 11:00 am. to Noon. This is to be a live, remote broadcast of the service from an area church. Churches will be rotated so that different ones are featured each Sunday.

Missionary Report, Sunday, 7:40 to 7:55 a.m. This proposed program resulted from a suggestion made by a local missionary group. It will contain a report of the group's world-wide missionary activities and will be supplied to the station as a taped program in advance of the broadcast day.

Game of the Week, Saturday, 10:00 a.m. to Noon. This will be a weekly, play-by-play description of an important local high school football, basketball, or Little League baseball game. Games to be broadcast will be selected on the basis of the season of the year and Radio New Jersey's best judgment as to the most important athletic contest locally in any particular week. Practically all of these games will be taped, because many games in the locality are played in the evening, when the station is not on the air. Friday night is a popular night for such games, so that the Saturday morning time slot is a logical place for this programming. Should games be played in the afternoon, the station will endeavor to carry them live as "special" programs.

Special Programs: Special programs will be broadcast when warranted. These will include religious programs on religious feasts and holidays, coverage of important local meetings and debates prior to elections and referendums.

Issue 14—The Lake-River Amendments of May 12, 1967 and January 9, 1968

40. As noted in paragraph 2, *supra*, numerous issues were either added or expanded against Lake-River Broadcasting Corp. by the Review Board after designation for hearing. With the dismissal of the Lake-River application, the specific questions to which many of these issues were directed have been rendered moot. However, because the majority ownership of Radio New Jersey and Lake-River are the same, and reimbursement to Lake-River for the dismissal of its application is an outstanding question, the factual matters underlying the specification of those issues must be considered. In the context of this proceeding as now constituted, Issue 14 requires a general inquiry into the facts and circumstances surrounding the prosecution of Radio New Jersey's Lakewood application (later Lake-River) subsequent to its filing in order to ultimately determine whether Radio New Jersey and/or Lake-River are qualified to be licensees of this Commission and whether reimbursement should be permitted. This issue relates to: (1) the availability and suitability of the Aitken site involved in the May 12, 1967 amendment; and (2) the suitability and feasibility of the Lipman site included in the January 9, 1968 amendment.

41. Just after Radio New Jersey became aware that the Heterbrugge site for their Lakewood application had been taken off the market, Mr. Jay Kaplan suggested a 12-acre tract nearby at more money. On or

about December 7, 1966 Radio New Jersey forwarded a check in the amount of $400 to Jay Kaplan to cover an option on the property. However, before Mr. Kaplan woud execute an option Radio New Jersey told him to stop negotiations. The reason Radio New Jersey decided not to utilize this site was because they decided they would need to find a site in another area around Lakewood in order to achieve compatibility with other applications then pending before the Commission.

AITKEN SITE

42. In January 1967, Radio New Jersey received from its consulting engineers new overlays depicting the new 25 mv/m contour for the Lakewood application and the land requirements for a three-tower directional antenna system. The Radio New Jersey principals began looking at property and about March 20, 1967 met Mr. and Mrs. Aitken whose property appeared to suit their needs. The Aitkens were willing to lease their property and Radio New Jersey went ahead and prepared a draft option agreement and an attached ground plat with the area available to them shaded in. The ground plat depicted a triangular-shaped area with five numbered lots or parts: (1) was the undeveloped (shaded area) property owned by the Aitkens; (2) was the lot on which the Aitken home was located; (3) was a lot owned by others which the Aitkens later purchased; (4) was a lot owned by others but not needed by Radio New Jersey; and (5) was a lot owned by the city of Lakewood which the Aitkens had been attempting to acquire. This information was provided to Mr. Boughrum and Mr. Tighe, Jr. by the Aitkens and formed the basis for the draft option agreement and attached plat.

43. The draft option agreement and check were mailed to the Aitkens on March 28, 1967. Within the next two weeks they had two more meetings with the Aitkens to work out some minor changes in the basic agreement, which included: (1) an escrow provision requiring deposit of sufficient cash to restore the property to its original state (i.e., removal of all towers and transmitter building); and (2) that the towers and buildings would not be located closer than 150 feet from either road fronting their property. The Aitkens also wanted the option agreement to be prepared by an attorney, and arrangements were made to have this taken care of. However, the description of the property to be leased in the agreement drawn by the attorney contained an obvious error. Also, the testimony of the Aitkens shows their willingness to make any or all of their property available for antenna use purposes.

44. Sometime in March 1967, the decision was made to use a four-tower directional array. This information was forwarded to the engineers on or about April 1, 1967. Mr. Pauley, the consulting engineer, called either Boughrum or Tighe, Jr. to find out if Lots 1, 2, 3 and 5 were included and was advised that he should use them. The engineering portion of the May 12, 1967 amendment was prepared on the basis of the information provided by the principals of Radio New Jersey. The ground plan submitted in that amendment depicts a single unit of property which includes all of Lots 1–5 on the ground plan originally

prepared by Radio New Jersey. Mr. Tighe executed this amendment as true and correct.

45. The amendment filed by Radio New Jersey on May 12, 1967 contemplated that the four towers would be located on Lot 1 and that portions of the ground system would extend onto Lots 2, 3 and 5. However, there was a misundertanding about Lot 5, which is a one-acre lot zoned industrial that had been acquired by the city several years previous by reason of tax delinquency. The Aitkens had been interested in acquiring this lot for years and their affidavit, confirmed by Mr. Aitken's oral testimony, states:

> * * * At the time we met Bob and Larry, in March and April of 1967, we told them of our desire to acquire Lot 5, but we did not intend to assure them that we would be able to get it. We are, in fact, still desirous of getting it, but it has not yet been made available on a tax sale basis. In our discussion on Sunday, October 19, 1969, this was the only point where Bob and Larry's recollection differed from ours. They said that it was their impression that we felt in 1967 that Lot 5 was unquestionably available. We feel that they may have gotten this impression from our telling them that we were trying to buy it; however, we had no assurance in 1967 that we would, in fact, be able to get it. We had then, as we do now, a desire to buy it.

46. Tighe and Boughrum were under the impression that Lot 5 was in the same status as Lot 3—that is, that the Aitkens could acquire it, when they gave their engineer his instructions in March 1967. They remained under that impression until October 19, 1969, when they and their attorney interviewed the Aitkens in Lakewood. The record shows that if Lot 5 were unavailable, the antenna array could be moved about 75 feet southwest and 180 or 240 ground radials installed around each tower to produce a reasonably stable pattern. However, the engineer testified that if another site could have been found he would have advised its use, rather than using the Aitkens property without Lot 5.

47. As a result of allegations in the pleadings, the Review Board expressed concern about the adequacy of the Aitken site to accommodate the antenna proposal. The ground wires emanating from each tower were depicted as having a maximum length of 210 feet. However, a 210-foot arc from three of the towers would fall outside the boundaries of the property. The ground plan submitted with the May 12, 1967 amendment made it clear that the ground radials from these three towers would not extend beyond the property boundaries, but were drawn up to the boundaries, and the plan contained the statement:

> 120 #10 copper wire radials 210′ in length, *shortened and bonded as shown*, buried approximately 6 inches, plus a 24′ x 24′ copper ground screen about each tower. (Italics supplied).

The wording thus indicated that some of the ground radials would be shortened in the manner shown on the plan, and would not extend beyond the proposed property boundaries. The engineer further stated in his affidavit:

> The amendment did not assume, however, that ground wires would extend beyond Cross Street or Prospect Road or beyond the eastern boundary of the property. Figure 11 of the amendment states that the ground wires would be "shortened and bonded" as shown. It will be noted that on Figure 11 the arcs from the towers do not extend past the property boundaries; this was done deliberately in order to show that the ground wires would be shortened.

48. Also, in designating Issue 14, the Review Board noted that although the May 1967 amendment substituted a four-tower array for the two-tower array originally proposed, corrected cost figures reflecting the two additional towers were not filed. The Board indicated that this is one of the matters to be considered in determining "whether Lake-River has evinced a pattern of conduct which may be something less than the requisite candor expected of applicants for broadcast facilities." To explain this oversight, Radio New Jersey placed in the record an intra-office memorandum from the files of its former attorney dated August 10, 1967, which states:

> Larry Tighe called. * * * He wants to know whether or not we reflected the additional cost for an additional tower when Radio New Jersey amended the engineering portion of the application. He said this new tower will increase the cost considerably.

On the same day the attorney, in response to the above call, wrote a letter to Lawrence Tighe stating, in pertinent part:

> At the time when the last engineering amendment was filed to your application, we submitted a brand new financial proposal, based upon the bringing-in of your father and Sey Krueger. However, we did not show any change in overall costs because nobody advised me that the costs were being increased.
>
> Obviously, such an amendment should be filed, if there has been a cost increase. However, in light of the pendency of a further engineering amendment, I think the best procedure would be to submit the new cost figures when the new amendment is tendered. I suggest that as soon as you locate a new transmitter site, you let Jerry [the attorney who took the phone call from Tighe] or me know what the costs thereof are going to be. Meanwhile, when Pete [the engineering consultant] finishes the new engineering, I will have the construction costs of the new engineering proposal figured out by Gates [the equipment supplier], so a complete new financial showing can be made. I assume that it will be submitted with the same amendment which specifies the new transmitter site and the new corporation.

49. The last paragraph in the above quotation refers to the fact that at this time, August 1967, Radio New Jersey's principals knew that they would probably be specifying another site in order to achieve more compatibility with other pending proposals than could be achieved from the Aitken site. According to the record, Tighe's thought, at least from August 10 on, was that they would supply cost estimates for the four-tower array at the time that the anticipated amendment was filed. He stated that the May 1967 amendment made it very clear that they were going from two towers to four towers and that it was obvious that this would cost more money. He also knew, however, that the May 1967 amendment showed the availability of a $100,000 loan from Seymour Krueger, and he was satisfied in his own mind that their available funds were more than sufficient to cover the costs of a four-tower array. It thus appears that Radio New Jersey and its principals had no motive for failing to include the additional costs in the May 1967 amendment or for failing to supply the cost figures until January 1968. Their failure to do so was an inadvertence not noticed until August 10, 1967, at which time Radio New Jersey requested counsel to correct it. From then until January 1968, the delay was pursuant to counsel's advice that the defect should be cured when the next engineering amendment went on file.

50. Between the time Radio New Jersey filed its amendment on May 12 and the time they received the final draft option agreement from the attorney on June 22, they had determined to seek another site in order to achieve greater compatibility with other pending applications. On September 11, 1967, Radio New Jersey notified the Aitkens that they were no longer interested in their property.

LIPMAN SITE

51. After Radio New Jersey determined that for compatibility purposes the Aitken site would not be suitable, they began looking for a new site in August 1967. Because of high tension power line problems and property owners who were unrealistic about the value of their land, the search took a long time. Finally, Mr. Boughrum met Mr. Lipman who owned property including two small lakes used to irrigate cranberry bogs. Mr. Boughrum of Radio New Jersey negotiated a lease option agreement with Mr. Lipman that was executed on December 31, 1967. On January 9, 1968, the Lakewood application was amended in part to reflect this change in transmitter site, and to change the name of the applicant from Radio New Jersey to Lake-River Broadcasting Corp.

52. One of the issues included in the designation order (Issue 3) was to determine whether there was anything in the vicinity of the proposed site which might affect the proposed radiation pattern. Thereafter, as the result of a petition to enlarge issues filed by Mid-State Broadcasting Company in August 1968, the Review Board expanded existing Issue 3 to include a determination as to whether this site proposed is feasible, and existing Issue 9 to cover the adequacy of cost estimates. Radio New Jersey contends that the dismissal of the Lake-River application rendered moot these two issues, and that these questions were not within the scope of either Issue 14 or 15 or of any other issue. Inasmuch as the Board, in said order, stated that "the real question raised is whether Lake-River has evinced a pattern of conduct in dealing with the Commission which may be something less than the requisite candor expected of applicants for broadcast facilities," findings will be made on these matters.

53. The aerial photograph of the antenna site submitted with the amendment reveals that the center of the site was approximately at the edge of a lake. The amendment contemplated that one of the towers would be in the lake, two on the edge of the lake, and one on land, according to Mr. Pauley, who prepared the engineering portion. Pauley further stated that he "never, at any time, had any intention of concealing that the array would be constructed on a lake site." Pauley was advised by Boughrum that the lake could be drained, that the water was no more than a foot or two deep in the area where the one tower would be placed, and that the water level fluctuated no more than eight inches. Boughrum secured the information about the lake drainage and the water level fluctuation from the landowner, and the water depth at the tower location from visual observation. Based on this information the engineer assumed that the ground system could be laid on the lake bottom without any adverse affect on the radiation

pattern. The record shows that the lake, at its deepest part, was between six and eight feet deep, but the depth at the point where the one tower was to be placed is not disclosed, other than as stated above.

54. On October 25, 1968, the Bureau filed a petition to enlarge issues to determine whether, based on measurements, Lake-River's proposed radiation pattern would provide a 25 mv/m signal over the business district of Lakewood and 5 mv/m over the entire city. On December 31, 1968, the Review Board adopted an order that, in effect, called for Lake-River to take measurements to establish whether the proposed operation from the Lipman site would provide Lakewood with the required coverage. In early May 1969, measurements were taken which disclosed that the conductivity was so low, and so different from the M–3 map, that the proposed operation would not place a 25 mv/m signal over the principal business district of Lakewood, nor would the 5 mv/m contour encompass the entire city. The record shows that Tighe and Boughrum, in spite of the measurements, desired to utilize the Lipman site and attempt to secure a waiver of Section 73.188 of the Rules, and that they agreed to give up the site only because of the urging of their engineering and legal advisers.

55. After the aforesaid measurements had been taken, showing a conductivity as low as 1 on one of the radials, Pauley joined in the recommendation of Pete Johnson and Associates that Lake-River seek another site. According to the record, this recommendation was not based on any feeling on Pauley's part that construction at the lake site was not feasible or that it was not a suitable site, but was based on the conclusion that, in view of the May 1969 measurements, there was no practical way to comply with Section 73.188 of the Rules from the Lipman site. Pauley's studies of the radiation required to provide a 25 mv/m signal over the Lakewood business district revealed that with the proposed four-tower array it would be impossible. To put such a signal over the business district would require numerous towers, and such a solution would be highly impractical. The record is silent as to whether Pauley told Lake-River's principals that redesign of the array to provide 25 mv/m to Lakewood, although theoretically possible, was actually impractical.

56. There was much contention among the various parties to this proceeding regarding the two aforesaid amendments, i.e., the May 12, 1967 and January 9, 1968 amendments. One controversy involved the placing of the towers at the Lipman site. Mid-State Broadcasting Company presented testimony showing cost figures considerably greater than those proposed by Lake-River. Such testimony was prepared by the engineer based on information supplied him by Mr. Lieberman, president of Mid-State, and assumed facts not involved in Mr. Pauley's computations, including placing two towers in the lake, and a water fluctuation of about four feet. Mr. Lieberman is not an engineer, and the Mid-State engineer had not visited the Lipman site when he plotted the array, so no weight can be given to such testimony.

57. As noted in paragraphs 48 and 49, *supra*, Radio New Jersey did not reflect the increased cost of construction in changing from two to four towers when it amended its application on May 12, 1967. Plead-

ings in this case suggest that the reason for such failure was that Radio New Jersey was not financially qualified to construct its two proposals. The record shows that in May 1967 the applicant had a $100,000 loan commitment from Krueger and other loan commitments and stock subscriptions totaling $57,300 for a total of $157,300. The following table shows the money needed:

Hackettstown cash needed, per application	$38,339
Lakewood cash needed, per application	34,458
Additional cash needed for both (per Bureau's calculation) to allow for full year's expenses	77,300
Total needed	150,097

Thus, Radio New Jersey had a cushion of more than $7,000 over the cash needed. Furthermore, the Radio New Jersey Lakewood application expressly stated that:

> Applicant recognizes that the Commission requires a showing of ability to operate the station for an entire year. However, applicant's studies of the Lakewood-Toms River market convince the applicant that revenues will be available to sustain the station after the initial 3-month operating period. Applicant will submit appropriate evidence of the availability of such revenues.

58. As found hereinbefore, the record shows that the failure to include the additional costs in the May 1967, amendment was an inadvertence that was not noticed until August 1967, at which time Radio New Jersey requested its counsel to correct such oversight, and thereafter, until the January 1968 amendment, the delay was occasioned by counsel's advice that the deficiency could be cured when the next engineering amendment was filed.

59. As found hereinbefore, in January 1968 the Lakewood application was amended to: (1) change the applicant to Lake-River; (2) change transmitter sites; and (3) change the financial proposal both as to costs and financing. The new corporation, Lake-River Broadcasting Corp., was formed on September 25, 1967, with Tighe, Boughrum, and Tighe, Sr., as directors and incorporators. However, in order to strengthen its financial position and its comparative evaluation, the incorporators got in touch with Donald Towbin and Paul Larson, residents and businessmen in Lakewood, in August 1967. Thereafter, everything that was done about the corporation was done in contemplation of Towbin and Larson joining. The record shows that in October 1967, stock certificates were prepared, but not delivered to these two persons. Also in October, Towbin and Larson completed biographical information to be supplied to the Commission with the application form, and supplied balance sheets dated in September. On November 14, 1967, Washington communication counsel sent a memorandum to Tighe and Boughrum entitled "Requirements for amendment to Lakewood application," outlining the things that would have to be done, including a suggestion that loan commitments in the amount of $100,000 be obtained from Towbin and Larson, and pointing out that Tighe and Boughrum, if desired, could "receive their stock for services to be rendered to the corporation."

60. The percentages of stock ownership agreed upon were: Tighe and Boughrum, 26% each; Towbin and Larson, 19% each; and Krue-

ger and Tighe, Sr., 5% each. The amendment application answered the "funds on deposit" question, "New Corporation—no bank account yet." This statement was true at the time the application was drawn up, but by the time it was filed an account had been opened and a deposit of $30 from Towbin and Larson had been made. The January 1968 amendment also stated that the stockholders "have purchased 1,000 shares of the corporation's common stock for $10,000." The record shows that the four who had been Radio New Jersey stockholders were allowed $6,570 as an equity transfer for expenses already paid, and Towbin and Larson agreed to pay $4,030 in cash, for stock and loans. The latter two each made $15 payments in December 1967, $1,000 each in February 1968, and $1,000 each in July 1968. The amendment also proposed to borrow $100,000 from Towbin.

61. In the designation order, the Commission expressed concern about Towbin meeting his $100,000 loan to Lake-River. However, the Examiner accepted an amendment to the Lake-River application on November 22, 1968, that substituted a $100,000 bank loan from the First State Bank of Ocean City, Toms River, New Jersey, for the Towbin commitment. This amendment effectively mooted the question raised. The bank letter required the endorsement of each of the Lake-River stockholders, and each of them agreed in writing to do so. The record also shows that Towbin, whose loan commitment had been superseded by the bank loan, was willing to let the corporation have such additional funds as might be needed.

62. The Broadcast Bureau contends that Towbin and Larson joined Lake-River Broadcasting Corp. several months before the January 1968 amendment was filed and, therefore, that the applicant violated the Commission's Rules. However, the record shows that although discussions with these two persons were held beginning in August 1967, and the two furnished information in September and October 1967 for the purpose of preparing the amendment, they did not actually join the corporation until they put up money and Towbin agreed to loan the corporation $100,000. This occurred in December 1967, and shortly thereafter, i.e., January 9, 1968, the amendment was filed.

63. The record further shows that the principals of Lake-River relied on Pauley and Friedland, both of whom assured them that the construction proposed at the Lipman site was feasible and reasonable. Lake-River's cost estimates were based on consultations with these two persons, and with Lipman. Except by inference or argument, there is no evidence that Lake-River acted in any way to mislead or deceive the Commission, or that their proposal of the Lipman site was lacking in candor. While such proposal might not have been prudent, it was made in good faith, and it was only after the May 1969 measurements showed that the proposal would not provide the coverage required by the Rules, and only after urging from its engineering and legal advisers, that Lake-River agreed to seek another site.

64. When Lake-River attempted to amend its application to specify a different site, such amendment was denied by an order released August 19, 1969. Lake-River filed an appeal from that denial with the Review Board, and the latter affirmed such denial on October 13, 1969.

104-019—74——6

While the aforesaid appeal was pending, Lake-River announced on the record that an agreement was being worked out which would dismiss its application, and Mid-State Broadcasting Company and Somerset Valley Broadcasting Company would, with Review Board approval, reimburse Lake-River for part of its expenses. Subsequently, appropriate pleadings were filed and on February 13, 1970, the Review Board dismissed the Lake-River application with prejudice, and held in abeyance the question of reimbursement pending the decision in this proceeding.

Issue 15—Interest of Donald Towbin in Lake-River Broadcasting Corp.

65. This issue was added because, at the time the January 1968 amendment was filed, Mr. Towbin was to be the corporation's principal source of funds. However, on November 22, 1968, before the taking of testimony began, the Examiner accepted an amendment to the Lake-River application substituting a $100,000 bank loan for the proposed loan from Towbin. Towbin's interest never exceeded 19%, and the record shows that he never exercised control over the corporation, nor any greater influence than he was entitled to by virtue of such 19% ownership interest. Mr. Towbin testified, without contradiction, that it was never intended by him, or the other stockholders, that he should exercise *de facto* control of Lake-River.

Issues 17 and 18—Lake-River's Public File

66. When the principals of Radio New Jersey were preparing to file the Lakewood application, they asked Mr. Jay Kaplan, the real estate broker they had used and the only one they knew in Lakewood, to maintain the public file of their application. In the fall of 1967, Melvyn Lieberman, the president of competing applicant Mid-State Broadcasting Company, went to Kaplan's office to look at the file. The secretary couldn't find it and asked him to return when Mr. Kaplan was there. A few days later Mr. Lieberman returned and saw Mr. Kaplan, who provided him with some papers from the Lakewood application and said these were all he had. According to Lieberman, they included only the amendments to the application beginning in May 1967 through the time of Mr. Lieberman's visit in the fall of that year.

67. On November 6, 1967 Mr. Kaplan wrote Lake-River/Radio New Jersey's attorney and requested another copy of the Lakewood application. After an investigation was conducted by the applicant's principals a complete new copy of the application was given to Mr. Kaplan.

68. On July 24, 1968, publication of the designation of the Lakewood application for hearing was ordered by Lake-River's attorneys. Publication was made on July 29 and August 1, 5 and 8, 1968. This notice advised that the application was available for public inspection at the real estate offices of Jay Kaplan. On approximately August 1, 1968 Lake-River's public file was removed from Kaplan's office to the automobile agency of Mr. Towbin, a Lake-River principal. Mr. Kaplan was instructed to advise anyone wishing to see the file where it was

located. On August 5, 1968 Mr. Tighe notified their attorney that the public file had been moved and the latter said that so long as Kaplan advised others where the file was located they would be in compliance with the Commission's Rules. At that time Mr. Tighe was unaware that publication had commenced.

69. During the first or second week of August 1968, Mr. Lieberman again called at Mr. Kaplan's office to see the file. Mr. Kaplan advised him that he no longer had the file and that he believed it had been removed to the Towbin automobile agency. On September 5, 1968, after talking to Mr. Lieberman, Mr. Robert Gold went to Kaplan's office and asked to see the public file. According to Gold, the secretary present at the time told him she didn't know where it was. However, according to Kaplan, his secretary said that Mr. Gold had not been there. On September 30, 1968, Mr. Lieberman went to the Towbin agency and asked Mr. Towbin if he could see the public file. Towbin said it was in several places in the agency, the secretary who usually took care of it was out sick, and asked Mr. Lieberman to return at 2:00 p.m. the next day. Mr. Lieberman returned on October 2, 1968 and in Mr. Towbin's absence spoke to his bookkeeper. She advised Lieberman that it was spread around the agency and asked him to come back when Mr. Towbin was there. Lieberman believes the bookkeeper eventually called Towbin and then asked Lieberman to return at 2:00 p.m. that afternoon, Mr. Lieberman did not do so.

70. On October 21, 1968, Lake-River, in its opposition to a Bureau petition to enlarge issues, advised that on October 17, 1968, a complete application had been sent to Mr. Jay Kaplan requesting that he again make it available to the public. The pleading further advised that since that date complete files were being kept at both Kaplan's and Towbin's agency. The file was, in fact, provided to Kaplan on October 15, 1968, and Mr. Tighe in his later testimony affirmed that the two public files were being maintained. On July 3, 1969, Mr. Lieberman and a private investigator went to Mr. Kaplan's office and inspected the public file. The only part missing was the engineering portion of the January 9, 1968 amendment. They then went to Towbin's agency, asked to see the public file, and were advised that it was being kept at Kaplan's office.

71. According to Mr. Tighe, Jr., it was always Lake-River's intention to comply with both the letter and spirit of the publication rules and if the application was ever not available it was contrary to their intentions. Instructions were given to Mr. Kaplan at all stages. Mr. Tighe believed he understood them and assumed that everything was proper with respect to the public file.

72. The foregoing findings have been arrived at after due and deliberate consideration has been given to the voluminous arguments by Radio New Jersey, Vander Plate and the Broadcast Bureau as to the interpretations that should be placed on the testimony that has been presented in this proceeding.

ULTIMATE FINDINGS AND CONCLUSIONS

1. This hearing when designated involved seven applications for two frequencies, linked by the common control of Radio New Jersey

(Hackettstown, on 1000 kHz) and Lake-River Broadcasting Corp. (Lakewood, on 1170 kHz) and issues which went to the basic qualifications of those two applicants as well as Louis Vander Plate (Franklin, on 1000 kHz). Subsequent to designation various dismissals and grants have taken place so that the only application remaining for consideration is that of Radio New Jersey for Hackettstown. In addition, reimbursement to Lake-River Broadcasting Corp. was made contingent upon the favorable resolution of the outstanding basic qualifications issues in this proceeding as they apply to Radio New Jersey either directly or through the element of common control with Lake-River.

2. Remaining for consideration in this proceeding are: (1) the feasibility of the last Lake-River transmitter site; (2) whether Radio New Jersey had a reasonable assurance that the transmitter sites proposed in its original applications for Hackettstown and Lakewood were available; (3) whether Lake-River had a copy of its application available for public inspection; (4) the *Suburban* issue; and (5) with respect to many of these issues, as well as specific issues 3, 5, 6, 9, 14, 15 and 18, whether the applicant, based on submissions to the Commission and/or testimony of its principals during the hearing, possesses the requisite qualifications to receive a grant of its application.

Site Availability—Issue 5

3. This issue seeks to determine whether Radio New Jersey had, at the time of filing, a reasonable assurance that the transmitter sites originally proposed in its applications for both Hackettstown and Lakewood would be available for the use intended. These sites, the Sheldon site in Hackettstown, and the Heterbrugge site in Lakewood, will be discussed separately.

THE SHELDON SITE

4. In September and October 1965, the principals of Radio New Jersey searched the Hackettstown area for a site. Eventually, they met Mrs. Sheldon, who owned a 32-acre tract in the Hackettstown area. After several discussions with Mrs. Sheldon, she agreed to give them a two-year option to lease seven acres of her tract and Radio New Jersey agreed to have the option drawn by their attorney. After obtaining Mrs. Sheldon's agreement on the option, but before it could be drafted and executed, Radio New Jersey filed its application on October 29, 1965. The draft option agreement was mailed to Mrs. Sheldon along with a binder check in the amount of $150 on October 30, 1965. Thus, it is concluded that Radio New Jersey, at the time it filed its application for Hackettstown, had reasonable assurance that the property it proposed for a transmitter site would be available.

THE HETERBRUGGE SITE

5. In late September or early October 1966, Radio New Jersey began looking for a site in Lakewood. They visited the real estate offices of Jay Kaplan and asked if he had any listings for property suitable for

their transmitter site. Kaplan had one in the area Radio New Jersey was interested in, and within their price range, which was owned by a Mr. Heterbrugge and had been listed with Kaplan's office since January of 1966, for a price of $7,500. They went out and viewed the property, returned to Kaplan's office and instructed him to attempt to obtain an option on the property. Kaplan, while the principals were still in his office, attempted to reach Heterbrugge by telephone, but he was not at home. Kaplan, who did not have authority to act on Heterbrugge's behalf, finally reached Heterbrugge about four days later and conveyed the Radio New Jersey offer. Heterbrugge counter-offered at a price of $9,500. Several days passed between the time Kaplan conveyed the counter-offer to Radio New Jersey and the time they authorized Kaplan to accept, and Kaplan advised Heterbrugge of such acceptance. Several more days passed before Heterbrugge advised Kaplan that if he could not get $11,000 he would take the property off the market. Between the time Radio New Jersey authorized Kaplan to accept the $9,500 price and Heterbrugge demanded $11,000, the Lakewood application was filed on October 26, 1966. Radio New Jersey next authorized Kaplan to accept the $11,000 price, but it had already been taken off the market. Heterbrugge subsequently refused to consider another Radio New Jersey offer of $13,000. On November 18, 1966, after it became certain they could not acquire the Heterbrugge property, Radio New Jersey notified the Commission that the site specified in their application was no longer available and they were seeking a new one. Accordingly, it is concluded that the Heterbrugge property was, in fact, listed with Jay Kaplan for sale, and Radio New Jersey acted reasonably and responsibly in specifying that property as its transmitter site at the time it filed its application.

The Controversy Involving the Sheldon and Heterbrugge Sites—Issue 6

6. The findings of fact set forth in great detail the circumstances surrounding the controversy involved in these two sites. With respect to the *Sheldon* site, between the time Mrs. Sheldon agreed to lease seven acres of her land to Radio New Jersey and her receipt of the written agreement, she changed her mind. She notified the applicant that she would not sign, but would give them an oral option in lieu thereof, and agreed that if she received an offer to purchase her entire tract, she would give Radio New Jersey the right of first refusal. Radio New Jersey had filed its application October 29, 1965, and they told Mrs. Sheldon they would attempt to secure another site but were unsuccessful and stopped looking after November 1965.

7. In May 1966 Vander Plate learned that the Sheldon property specified in the Radio New Jersey application was for sale, so he had his attorney, Samuel Kaplan, obtain an option on the property. On May 20, 1966 Kenneth Martin and Samuel Kaplan visited Mrs. Sheldon. Martin's testimony is to the effect that Mrs. Sheldon, after saying her property was for sale, stated that although she had no legal agreement with anyone for the sale or lease of her property, she produced a map of the property Radio New Jersey had negotiated for.

It was Martin's impression that Mrs. Sheldon had given an oral option on her property to Radio New Jersey, but she stated that that option was not a written option. After about an hour Mrs. Sheldon gave Samuel Kaplan a 90-day option on her property. Of the three persons present at the signing, Mr. Martin's testimony is entitled to greater weight. Mrs. Sheldon stated that she had not heard from Radio New Jersey for some time and assumed that they had located another site and were no longer interested in her property.

8. On July 20, 1966, Samuel Kaplan again visited Mrs. Sheldon and secured an extension of the option to December 1, 1966. In view of the conflict between Samuel Kaplan and Mrs. Sheldon as to the wording of the extension of the option, it is impossible to make a finding as to which one of the two is correct.

9. After the Vander Plate-Philip Baker visit to Mrs. Sheldon on November 15, 1966, she became concerned and called Larry Tighe, Jr., the president of Radio New Jersey, and advised him of all that had transpired. This is the first knowledge the applicant had of the controversy involving their proposed antenna site. Radio New Jersey immediately made arrangements to purchase Mrs. Sheldon's property after the Kaplan option expired on December 1, 1966. The essential question with respect to Radio New Jersey is whether they had any knowledge of Mrs. Sheldon's dealings with Samuel Kaplan. On that question, the record admits of no doubt. The uncontradicted testimony of record is that they had no knowledge of these events until November 1966. When they did learn of them, they moved promptly to secure the property by contract. It is uncontroverted that Radio New Jersey erected a tower and conducted tests for several days from the Sheldon property. These tests began on May 21, 1966, the day after Samuel Kaplan secured his option. It is concluded that Radio New Jersey acted in good faith and that the facts and circumstances with respect to the Sheldon site controversy have no adverse effect on the qualifications of Radio New Jersey and its principals. It is also concluded that the findings of fact with respect to the Heterbrugge site have no adverse effect on the qualifications of Radio New Jersey.

Ascertainment of Community Needs—Issue 7

10. The findings show that Radio New Jersey conducted three surveys of the proposed service area. The problems and needs elicited from the community leaders, as well as the needs suggested by the persons surveyed during the public survey, were assembled and evaluated. After such evaluation a program format was devised to accommodate the problems and needs of the area. The duration, time and problems to be covered by each program have been detailed. Upon the basis of the findings set forth hereinbefore, it is concluded that Radio New Jersey has sustained its burden of proof with respect to the community survey issue.

The Lake-River Amendments of May 12, 1967 and January 9, 1968—Issue 14

11. With respect to the May 12, 1967 amendment, the findings establish that Messrs. Tighe and Boughrum were under a misapprehen-

sion as to the availability of Lot 5 when they furnished their consulting engineer with the information about the Aitken proposal. At the time the application was filed, and until October 19, 1969, they assumed that Lot 5 could be obtained by the Aitkens. With respect to the antenna array itself, the amendment clearly indicated that the ground radials would be cropped and would not extend beyond the boundaries of the triangle of land on which the Aitken property is situated. The findings further show that the engineer who prepared the amendment, in his calculations and design of the array, assumed that the ground radials would be shortened so as not to extend beyond the property boundaries.

12. When the four-tower array was laid out on the property, it was assumed that the towers would be located on Lot 1, and that portions of the ground system would extend on to Lots 2, 3 and 5. However, the record establishes that the array could have been placed on the property without using Lot 5, but the engineer stated that if another site could have been found he would have advised its use rather than using the Aitken property without Lot 5.

13. The amendment, as filed, did not include any statement of the cost of the two additional towers when the array was changed from a two-tower to a four-tower array. According to the record, this oversight was noticed in August 1967, and Tighe called his counsel to ascertain if the additional cost had been reflected in the amendment. The attorney's reply revealed that he had not previously been aware of the increase in costs, although he filed the amendment, and recommended that an appropriate financial amendment be filed. He further recommended that it be filed with a new engineering amendment which was already in contemplation. They relied on the advice of their attorney with respect to the corrective financial amendment. With respect to such amendment, it is concluded that the findings do not support a conclusion that Radio New Jersey, or its principals, had any motive for deceiving the Commission, nor did their misunderstanding of the advice they had received reflect a lack of candor.

14. With respect to the January 9, 1968 amendment, which changed the name of the applicant to Lake-River Broadcasting Corp., a change in transmitter site and a change in financial arrangements, the findings establish that the applicant, in proposing the Lipman site, showed that the four-tower array would be situated so that one tower was in the lake, two towers on the edge thereof, and the remaining tower on dry ground. The engineer who designed the array was told that the lake could be drained for installation of the ground radials and the tower, and that the water level in the lake, when it was refilled, fluctuated not more than eight inches. These facts had been secured from the land owner by Mr. Boughrum. Under these circumstances, the record reflects that the proposed construction was feasible in the estimation of Mr. Pauley, the consulting engineer, Mr. Friedland, a friend and former stockholder in Radio New Jersey who was knowledgeable about radio construction, and Mr. Lipman, the owner of the property. That Tighe and Boughrum believed in the Lipman site, and in the feasibility and reasonableness of their proposal, is shown by their reluctance to abandon such site even after measurements

made in May 1969 established that they could not place a 25 mv/m signal over Lakewood from that location. The question raised by this issue is not whether the proposal was, in fact, feasible, but whether it was filed in good faith, and it is concluded that the record shows such good faith.

Interest of Donald Towbin in Lake-River Broadcasting Corp. Issue 15

15. When the amendment of January 9, 1968 was in contemplation, the principals of the applicant engaged in negotiations with Messrs. Towbin and Larson. After such negotiations had been underway for several months, the record establishes that Towbin and Larson committed themselves to join the corporation in December 1967 when they made their first payment on their stock subscription, and that the amendment was filed shortly thereafter. While the record shows that the four principals who had been Radio New Jersey stockholders paid for their shares of stock by an equity transfer for expenses already paid, Towbin and Larson paid for their shares of stock in cash.

16. The question of Towbin's exercising *de facto* control of the corporation was nullified when a bank letter was substituted for the $100,000 loan that he originally had agreed to make to the corporation. The record shows that the nature and extent of Mr. Towbin's interest in Lake-River was 19%, that he never exercised *de facto* control, nor was it ever intended by him, or the other stockholders, that he would do so, and it is so concluded.

17. The Broadcast Bureau argues that several items of expenses were not considered, nor taken into account, when the application was filed. In preparing its cost estimates, Lake-River relied on its consulting engineer and, in addition, made efforts to ascertain costs by consulting the landowner and a former associate experienced in such construction. The figures presented by Mid-State to show cost figures considerably greater than those proposed by Lake-River were prepared by an engineer based on information supplied by the president of Mid-State, a non-engineer, and assumed facts not involved in the Lake-River computation. The Mid-State engineer had not visited the Lipman site when he made this computation, and, consequently, no weight has been given to his testimony. Yet the Broadcast Bureau gives full credence and weight to his testimony in its proposed findings. Such cannot be allowed under the facts of this case. Moreover, the record shows that Mr. Towbin agreed to provide additional funds to the corporation in the event such need arose, and that he was financially able to do so. The applicant, undoubtedly, would have been given the right to amend its application to show additional financing in the event it became necessary, or if they deemed such additional money was needed.

Lake-River's Public File—Issues 17 and 18

18. The findings show that on two occasions the applicant learned that their opponent Lieberman stated that he had encountered difficulty in examining the public file of the Lakewood application. The first occasion revealed that the file, as presented, was incomplete.

Thereupon, Mr. Jay Kaplan, the keeper of the records in Lakewood, requested, and received, a complete new copy of the application. About ten months later Mr. Lieberman again called at Mr. Kaplan's office to see the file, and was advised that it had been removed to the Towbin automobile agency. Six or seven weeks later Lieberman called at the Towbin agency and asked to see the public file. He was advised that the file was not together, that the person with knowledge as to its location was sick, and was asked to return the next day at 2:00 p.m. Two days later Lieberman returned and was asked to come back at 2:00 p.m. when Mr. Towbin would be present. Mr. Lieberman did not do so. Lake-River stated that it was their intention to comply with the publication rules. They gave instructions to Jay Kaplan, believed he understood them, and assumed that everything was proper with respect to the public file. With the dismissal of the Lake-River application, this issue has been mooted. However, it is concluded that a complete public file of the Lakewood application was not available during normal business hours at times between 1967 and 1968. If Lake-River was still an applicant, a comparative demerit would be assessed against it.

19. In adding certain of the issues, the Review Board indicated that "the real question raised is whether Lake-River has evinced a pattern of conduct in dealing with the Commission which may be something less than the requisite candor expected of applicants for broadcast facilities." The findings reveal that mistakes and errors were made, but they were not of such gravity or frequency as to constitute a pattern of conduct, nor were they made deliberately with an intent to deceive the Commission. It is probable that a comparative demerit would have been imposed against Lake-River if it had remained an applicant, but there is no basis in this record for the disqualification of either Lake-River or Radio New Jersey.

20. By order released March 14, 1972, the Examiner granted the joint request filed by Carolyn M. Vander Plate, Administratrix for the Estate of Louis Vander Plate, and Radio New Jersey requesting dismissal of the Vander Plate application, and held in abeyance the application for partial reimbursement of out-of-pocket expenses pending resolution of the character qualification issues against Lake-River Broadcasting Corp. and Radio New Jersey. The foregoing findings and conclusions establish that the character qualification issues are resolved in favor of both applicants, Lake-River Broadcasting Corp. and Radio New Jersey. Consequently, the payment of partial reimbursement of out-of-pocket expenses, in the amount of $4,000, between Radio New Jersey and Carolyn M. Vander Plate is approved.

21. Also, in a Review Board order released February 13, 1970, a joint request for approval of agreement pursuant to Section 1.525, filed November 17, 1969, by Mid-State Broadcasting Company, Lake-River Broadcasting Corp. and Somerset Valley Broadcasting Company requesting the Board to: (1) approve the subject dismissal agreement; (2) dismiss the Lake-River application with reimbursement deferred; and (3) sever and grant the Mid-State and Somerset applications, was granted, but the action on the reimbursement provision

of the agreement whereby Mid-State and Somerset were to pay Lake-River $4,000 in partial reimbursement of its verified expenses, was held in abeyance pending resolution of the outstanding character qualification issues against Lake-River. Inasmuch as the character qualification issues against Lake-River have been resolved in Lake-River's favor in the instant decision, it would appear to be appropriate to approve the reimbursement agreement whereby Mid-State would pay Lake-River the sum of $2,500, and Somerset would pay Lake-River $1,500, or a total of $4,000, in partial payment of its expenses as set forth in said order of the Review Board, and the payment thereof is approved.

22. Upon the basis of the entire record in this case and the foregoing findings and conclusions, it is concluded that the public interest, convenience and necessity would be served by a grant of the Radio New Jersey application.

Accordingly, IT IS ORDERED that, unless an appeal to the Commission is taken by any of the parties or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Radio New Jersey for a construction permit for a new standard broadcast station at Hackettstown, New Jersey, to operate on 1000 kHz with a power of 1 kilowatt, daytime only, IS GRANTED;

IT IS FURTHER ORDERED, in view of the findings and conclusions hereinbefore set forth with respect to the character qualifications of Lake-River Broadcasting Corp. and Radio New Jersey, that the agreements for partial reimbursement of out-of-pocket expenses between Mid-State Broadcasting Company, Somerset Valley Broadcasting Company and Lake-River Broadcasting Corp., and between Radio New Jersey and Carolyn M. Vander Plate ARE APPROVED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Hearing Examiner.*

F.C.C. 73R–404

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HERBERT L. RIPPE, 3785 SUSANNA DRIVE, CINCINNATI, OHIO For Amateur Radio Station and Extra Class Operator Licenses in the Amateur Radio Service	Docket No. 19270

APPEARANCES

David E. Gebhart and *Bruce W. Haupt*, on behalf of Herbert L. Rippe; and *Christopher F. DeLaFleur*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted December 5, 1973; Released December 11, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. This case involves the application of Herbert L. Rippe for radio station license and extra class operator license in the amateur radio service. By Order, FCC 71–666, released June 30, 1971, the Commission designated the application for hearing on the following issues:

1. To determine all of the facts and circumstances surrounding the preparation, execution and filing of an application for a two-letter call sign by the applicant on March 19, 1968,[1] including correspondence in respect to said application.

2. To determine the facts concerning representations made by Rippe in three applications for Amateur licenses filed in 1947.

3. To determine whether the applicant was issued a license in the Amateur Radio Service at Nashville, Tennessee, in 1942.

4. To determine, pursuant to the evidence adduced under the above issues, whether the applicant can be relied upon to operate his station in accordance with the terms of his license and whether the Commission can rely upon the representations made in his present application.

5. To determine, if the foregoing issues are resolved in favor of the applicant, whether the applicant is eligible for and should be granted a two-letter call sign.

[1] This date is incorrect. The correct date, February 28, 1968, is established by stipulation at Tr. 36–37.

6. To determine, in light of the evidence adduced pursuant to issues 1 through 5, whether the applicant possesses the requisite qualifications to be a licensee of the Commission.

A hearing was conducted by Administrative Law Judge Isadore Honig whose Initial Decision, FCC 72D–61, was released September 14, 1972. In that decision Judge Honig found that Rippe had in fact obtained a two-letter call sign by fraudulent means; that he had not been a licensed amateur operator in 1942; that he was not eligible for a two-letter call sign; that he could not be relied upon to operate an amateur radio station in accordance with the terms of his license; that the Commission cannot rely upon the representations made in his present application; and that his application must therefore be denied. Rippe filed exceptions to the Initial Decision, and the Review Board heard oral argument on June 28, 1973.[2] The Board has considered the Initial Decision in light of the exceptions, the oral argument and the record in this proceeding, and is satisfied that the Judge's findings of fact fairly reflect the record evidence and adequately support his ultimate conclusion. Therefore, except as modified herein and in the rulings on exceptions contained in the attached Appendix II, the Judge's findings and conclusions are adopted. However, in view of the exceptions and argument, some discussion of matters raised thereby is necessary.

2. According to the Commission's records, Rippe's first amateur license was issued by the Commission on December 4, 1947. In late 1967, Rippe was actively engaged in DXing,[3] and he undertook to secure a two-letter call sign.[4] Rippe contends that he was first licensed in 1942, but that he lost his 1942 license document. After some preliminary correspondence with the Commission concerning the two-letter call, he contrived a scheme to prove that he had been licensed for twenty-five years. In the course of his employment, Rippe had learned that documents which were modified by paste-on strips and subsequently copied by the Xerox process appeared clean and it was impossible to detect the modification. With this in mind he proceeded to create a 1942 license document. He made two Xerox copies of his 1947 license which bore the date 12–4–47 at two places. He then cut the twos from the twelves on one copy and carefully pasted them over the sevens on the other copy so that the modified copy bore the date 12–4–42. The modified copy was again copied by the Xerox process and produced a clean copy which bore no evidence of the modification. This copy, together with his 1965 amateur extra class license, was then submitted to the Commission by Rippe with his December 18, 1967 ap-

[2] Due to malfunctioning of the reporting equipment, the transcript of much of this argument was lost. The matter was reargued on November 8, 1973. For a full explanation, see attached Appendix I.

[3] This activity involves communication with amateurs over long distances and often in foreign countries.

[4] Section 97.51(a)(5) of the Commission's Rules permits the assignment of a two-letter call to a previous holder of a two-letter call sign and to amateur extra class licensees who submit evidence that they have been a licensed amateur radio operator for 25 years. The two-letter sign is regarded by some amateur operators as a prestige symbol and Rippe testified that he believed it would be advantageous for DXing since it would only require four symbols, i.e., W8DE, rather than the five symbols in his former 3 letter call, W8BQH.

plication [5] as proof that he was qualified for a two-letter call sign. In reliance on these documents the Commission in March of 1968 issued an amateur license with the two-letter call W8DE to Rippe. Rippe continued to actively participate in amateur radio activities using W8DE as his call. However, under date of June 20, 1969, the Commission directed a letter to Rippe asking him for additional information supporting his eligibility for a two-letter call, including the original of his 1942 license.[6] In reply to that letter, Rippe submitted his letter of July 5, 1969, which, in response to the request for his original 1942 license document, stated:

> When I first learned the new rules governing two letter calls I spent considerable time trying to locate my original operator's license. I was unable to find the original only two photo copies which were made at an earlier date. One of these copies was sent with my two letter call application and the other is still in my possession. I believe these copies to be an exact reproduction. I know the original was not thrown out, but must have been misplaced when moving to my present location. I have continued the search this past week but have been unable to locate it. If at any time I find it I will forward it to your office immediately.

On November 6, 1969, the Commission released an Order to Show Cause Why Rippe's amateur radio station license should not be revoked. On the same date the Commission issued an order suspending his extra class amateur operator license. Each of these orders afforded the licensee an opportunity for hearing; however, Rippe chose to waive his right to hearing and submitted a letter dated November 21, 1969 in mitigation. In that letter Rippe continued to maintain that he had in fact been issued an amateur radio operators license in 1942. However, he conceded that he manufactured a Xerox license with a 1947 (1942) issue date and that his statement concerning the Xerox copies of his 1942 license contained in the July 5, 1969 letter was in fact false. He then apologized for his bad judgment and requested that the Commission be lenient.

3. It is quite apparent that the fraud perpetrated upon the Commission was no trivial matter which can be readily condoned by the Commission or overcome by Rippe's generally good reputation among his fellow amateurs and business associates, as urged by his counsel. On the contrary, it was a carefully contrived scheme designed to mislead the Commission. It is clear from Rippe's testimony that it was undertaken only after he had given careful consideration to his actions. Moreover, he proceeded with great care to create a product which would effectively deceive the Commission, taking into account such technical aspects as distortion in copying and the fact that pasted modifications would not be evident on the finished copy. While we might condone an isolated instance of lack of candor with passage of time and evidence of rehabilitation, that is not the case before us. In addition to his fraudulent attempt to obtain the license in December of 1967, Rippe, even after receipt of the Commission's June 20, 1969 letter which must have made it apparent that the Commission

[5] This application is actually dated by the applicant December 18, 1968, but it is stamped received at Gettysburg February 28, 1968, and it is stipulated in the transcript at page 36–37 that the date should be December 18, 1967, and that it was received for filing on February 28, 1968.

[6] This letter was not introduced into evidence, and the Board is relying on a paraphrasing of its contents by Bureau counsel with which Rippe agreed at Tr. 158 and 159.

questioned his fabricated 1942 license, continued to attempt to deceive the Commission by his letter of July 5, 1969.[7] It was only after the Commission issued its Orders of November 6, 1969, which made it very clear that the Commission would not accept his ruse, that he came forward with his explanation of the matter and requested the Commission to be lenient.

4. It is well established that the success of the Commission's regulatory scheme is dependent upon the personal integrity of its individual licensees. One who is not candid and trustworthy in all circumstances cannot and should not be accorded the privileges of a Commission licensee.[8] The evidence concerning Rippe's general character is of little decisional value in view of his deliberately calculated scheme to deceive the Commission.[9] Thus, even if we were to conclude that Rippe was in fact licensed in 1942, the record concerning his deceit of the Commission would require denial of his application.

5. The remaining factual issues in this proceeding run to the existence of the amateur radio license which Rippe alleges was issued to him in 1942. On these issues, as on the preceding one, the burden of proof is on the applicant. The evidence in support of Rippe's allegations is carefully set forth in the Initial Decision and no useful purpose would be served by describing it in detail here. We note that the affirmative evidence in the record concerning this matter is limited to the testimony of Rippe, his wife, Rippe Exhibit 18,[10] which was found in the Federal Record Center container which would normally have contained any amateur radio license issued to Herbert L. Rippe in 1942, and the testimony of Clayton Chapman who was qualified as an expert in records management and gave his opinion concerning the validity of the Commission's records of amateur radio authorizations. The affidavits of Siegfried W. Rippe, tendered as applicant's Exhibit #2; Amy M. Rippe, offered as Rippe Exhibit #3, J. T. Mersch, tendered as Rippe Exhibit #5; T. T. McCarthy, tendered as Rippe Exhibit #6 and Alfred Fritz, Jr., offered as Rippe Exhibit #8, all of which purport to support Rippe's allegation that he possessed an amateur radio license in 1942, were properly rejected by the Presiding Judge since those parties were not available to the Bureau for cross examination. In view of the nature of the allegations in this case and the relationship of the affiants to the applicant, the absence of such examination makes it impossible for the Judge and this Board to assess the truthfulness of the declarations contained in those affidavits.

---

[7] Rippe's rationale for his use of the words "I believe these to be an exact reproduction" as justified by the dictionary definition of the words "exact" and "reproduction" clearly does not justify the initial scheme to fraudulently create a "Commission license", nor does it successfully mask his clear attempt to perpetrate the fraud by his letter of July 5, 1969.

[8] *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

[9] *WDUL Television Corp.*, 36 FCC 497, 501, 2 RR 2d 131, 139 (1964). Other cases on point are: *WMOZ, Inc.*, 36 FCC 202, 1 RR 2d 801, reconsideration denied 36 FCC 1467, 2 RR 2d 1057 (1964), remanded 120 U.S. App. D.C. 103, 344 F. 2d 197, 4 RR 2d 2004 (1965), reaffirmed 3 FCC 2d 637, 7 RR 2d 373 (1966); *Charles P. B. Pinson*, 33 FCC 213, 22 RR 989 (1962), affirmed 116 U.S. App. D.C. 106, 321 F. 2d 373, 25 RR 208 (1963); and *Western Connecticut Broadcasting Company*, 31 FCC 2d 807, 21 RR 2d 863 (1971) (Review Board Memorandum Opinion and Order affirming Administrative Law Judge's ruling barring general character evidence).

[10] Rippe Exhibit 18 is a photographic copy of the Commission's request to the Federal Records Center for a name card for Herbert L. Rippe, bearing the date 11–20–42.

6. With regard to Exhibit 18, the Bureau relies on the testimony of Mr. Richard Everett, Acting Assistant Division Chief of the Amateur and Citizens Division of this Commission and Mr. Jack Bumgarner, Chief of the Reference Section, Federal Records Center. Mr. Everett testified that all records of amateur radio authorizations issued 1934 through 1954 were kept in the Federal Records Center in boxes, that the first and last name in each of 49 boxes was recorded on Federal Records Center Accession Sheet 60–A–419 and that the record of any license issued to Herbert L. Rippe during that period of time should have been in Box #42. It is clear from the record that Box #42 was examined on several occasions by both the personnel of the Federal Records Center and properly authorized employees of the FCC, and that no license dated December 4, 1942, issued to Herbert L. Rippe was found. When all of the record evidence with respect to Rippe Exhibit 18 is considered, that exhibit establishes only that on July 7, 1971, the FCC requested a name card (this term is commonly used to describe the alphabetical card record of amateur licenses issued during the period 1934–1954 and maintained in the Federal Records Center as part of accession number 60–A–419) for Herbert L. Rippe bearing the date 11–20–42. This was the date that Rippe testified that he successfully took an amateur radio operator's examination in Nashville, Tennessee. However, the date that appeared on the fabricated license which Rippe submitted with his December 18, 1967 application was 12–4–42. Mr. Bumgarner testified on direct examination that the presence of Rippe's Exhibit 18 in the box would indicate that a license issued in the name of Herbert L. Rippe bearing the date 11–20–42 had been removed from the box on July 9, 1971. However, on cross examination, he testified that on or about September 30, 1971 Mr. Everett and Mr. DeLaFleur, Bureau counsel in this proceeding, had visited the records center and he accompanied them to the stacks and watched them search box 42 and there was no record of any license issued to Herbert L. Rippe in the box. Bumgarner also testified that Everett and DeLaFleur had shown him the 1947 and 1948 license documents which they testified were received in response to the July 7, 1971 request and copies of which were received in evidence in this proceeding as part of Bureau Exhibit No. 15. He also, in response to cross examination, stated that they questioned the absence of a charge card for these documents. In reply to this inquiry he had caused a search to be made of the requests for records. The original of Rippe Exhibit No. 18 was discovered and Bumgarner caused a copy of that document to be made and inserted into the box at the place where any licenses issued to Rippe should have been. Bumgarner also testified that at that time some of the bundles were broken and some cards were on the bottom of the box so he had one of his employees search the box, card by card, refile the cards from the bottom of the box and retie the broken bundles. At the request of the Presiding Judge, Bumgarner also caused a search of the records to be made under the names Herbert, Louis and Lewis, but found no card of any authorization issued to Herbert L. Rippe. In view of this explanation for the presence of Rippe Exhibit 18 in Box 42, which is corroborated by the testimony of Mr. Everett, we cannot accept Bumgarner's direct testimony that

Rippe Exhibit 18 establishes that a name card (license document) for Herbert L. Rippe dated 11–20–42 had been removed from Box 42 on July 9, 1971. Nor, in view of the foregoing, can we accept Mr. Clayton Chapman's testimony regarding the same subject. See paragraph 9, *infra.*

7. As further evidence that Rippe was not a licensee of this Commission prior to 12–4–47, the Bureau introduced its Exhibits 6, 7 and 8, each of which was an application for amateur radio operator and station license filed by Rippe during the year 1947: in a block provided thereby at Item 10 Rippe indicated that the application was for a new station rather than for renewal or modification of an existing station. In response to Question 6: "I now hold or have held within five years radio operator licenses as follows": no information was supplied. Even if we accept Rippe's contention that he believed his 1942 license to have expired by virtue of the running of time, he nevertheless should have indicated that he had been licensed within the last five years. His failure to so indicate in his 1947 application raises a strong inference that he had not in fact been licensed for a period December 4, 1942 to December 4, 1945.[11] Rippe's memory of events which occurred in 1942 must certainly have been much clearer in 1947 than in 1967, some twenty years later. Moreover, it clearly would have been to his advantage to advise the Commission that he was or recently had been licensed at the time he filed his 1947 application. Mr. Everett also testified that since the American Radio Relay League is interested in new amateurs, he checked with that organization in an effort to be absolutely certain that every possible source was investigated, but no record of a license held by Rippe in 1942 was found. While this negative evidence is not entitled to the same weight as is the absence of official government records, it does show that considerable effort was made to discover any valid evidence that Rippe was in fact licensed in 1942.

8. It was established that during the 1942 period all applicants for commercial and amateur radio operator licenses were required to complete certain questionnaires concerning their citizenship and to submit their fingerprints to the Commission, together with their application. As noted, Rippe testified that he submitted fingerprints with his 1942 application. It was also established that fingerprints obtained in this manner were in turn forwarded by the FCC to the FBI, which routinely classified, searched and filed the fingerprint records. An employee of the FBI testified that at the request of Commission personnel he had searched the Bureau's records for fingerprints of Herbert L. Rippe submitted by the FCC in 1942, and had found no such records. He further testified that fingerprint records for radio operator licenses were routinely received by the FBI during the 1942 period, and that he had found other fingerprint records of Herbert L. Rippe submitted from other sources at other times. The record shows that the FBI was at the time of the hearing destroying many non-criminal civilian records, but that as of the time of the search no 1942 files had

[11] *Cf. Service Electric Cable TV, Inc.*, 23 FCC 2d 468, 19 RR 2d 99; reconsideration den. 20 RR 2d 258; aff'd 473 F. 2d 104, 153 U.S. App. D.C. 393, 25 RR 2d, 2079 (1972), and *Cable TV Co.*, 32 FCC 2d 783, 23 RR 2d 452; aff'd. No. 72–15 94 (D.C. Cir., filed March 9, 1973).

been destroyed.[12] As indicated above, under the then controlling rules each applicant's fingerprints which were submitted to the FCC were required to be forwarded to the FBI. The absence of a 1942 fingerprint record for Rippe at the FBI supports the conclusion that no application was filed. Without a valid application, no authorization would have been issued.

9. Mr. Clayton Chapman, who testified as an expert in records management on behalf of Rippe, expressed the opinion that the manual system utilized by the Commission to maintain its record of amateur licenses issued between 1934 and December 31, 1954, is deficient in so many ways that it is unreliable and that it would be impossible to determine whether or not an amateur radio operators license was issued to Herbert L. Rippe in 1942. The records complained of are the official minutes of the Commission's actions with respect to amateur radio authorizations during the relevant period. While this record system may not have been maintained perfectly it has not been shown to be so deficient or unreliable that the ordinary legal presumptions applicable to such records are not valid here. It is well established law that the absence of official record of an event is evidence of the non-occurrence of the event. This principle is incorporated into the proposed federal rules of evidence as an exception to the hearsay rule admissible in Federal Court. Moreover, the Commission's Rules recognize that the non-existence of official records may appropriately be considered in evidence. Section 1.360 of the Commission's Rules provides:

> * * * the absence of an official record or entry of a specified tenor in an official record may be evidenced by a written statement signed by an officer or his deputy who would have custody of the official record if it existed, that after diligent search, no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as provided in Section 1.359. Such statement and certificate are admissible as evidence that the records of his office contains no such record or entry.

Furthermore, precedent reveals that this Commission, other administrative agencies, and the courts have accepted the absence of an official record as valid evidence of the non-occurrence or non-existence of the event or thing which would have been proven by the existence of such record.[13]

10. While we do not believe under the circumstances here, that the inability to find a record of an amateur radio operators license issued to Herbert L. Rippe in 1942, standing alone, establishes that such a license was not issued, when considered together with all of the other evidence outlined above and weighed against all of the evidence submitted by and on behalf of Rippe, we cannot conclude that Rippe has established by a preponderance of the evidence that he was in fact a

---

[12] In his exceptions and at oral argument counsel for the applicant argues that the Bureau's failure to exchange an affidavit concerning this matter from FBI personnel which was in its possession prior to the hearing was detrimental to Rippe. While it may have been better practice to provide the FBI affidavit to counsel for Rippe at the time of the prehearing conference, no showing of injury was made. Rippe was not surprised, the affidavit was not made part of the record, and the Presiding Judge afforded Rippe six weeks after the testimony of the FBI employee to take whatever action he felt appropriate concerning this matter. Counsel did not avail himself of this opportunity.

[13] *Cathryn C. Murphy*, FCC 72D–60, 25 RR 2d 242 (1972); *Salem Television Co.*, 38 FCC 253, 4 RR 2d 281 (1965). See also *United States* v. *De Georgia*, 420 F. 2d 889 (9th Cir. 1969); *Ray* v. *Gardner*, 387 F. 2d 162 (4th Cir. 1967); and *Parker* v. *C.I.R.*, 365 F. 2d 792 (8th Cir. 1966).

104–019—74——7

licensed amateur radio operator in 1942. Rather, in our view, the opposite conclusion has been clearly established by a preponderance of the evidence.

11. At the original oral argument held on June 28, Mr. Bruce W. Haupt entered an appearance on behalf of Rippe.[14] The Board deviated from its usual procedure to afford Mr. Haupt five minutes in which to present additional arguments on behalf of Rippe. At the November 8 argument, Mr. Gebhart was asked if he wished to incorporate Haupt's argument as part of Mr. Rippe's case. He thereupon advised the Board that he wished to do so. During the course of his argument, Haupt contended that if the Board, upon examination of the record before it, was unable to accept Rippe's statement that he did in fact have an amateur radio operator's license in 1942, the Board should order a polygraph test and if Rippe passed such a test accept his statement and issue the licenses requested by his application. The foregoing request advanced after the close of an evidentiary record and the issuance of an adverse Initial Decision without reasonable justification for the delay, comes far too late. Accordingly, that request must be denied as untimely. Moreover, the Board notes that as a matter of policy the Commission has never relied upon the results of polygraph tests in proceedings before it and Rippe has advanced no justification for departure from that policy in this proceeding.

12. In sum, the Board concludes that there are two separate and independent grounds for Rippe's disqualification: first, his deceit in filing a forged document with the Commission, and his subsequent misrepresentations regarding the forgery; and, second, his misrepresentations as to the existence of a 1942 license. While each of these matters, standing alone, is sufficient to warrant an adverse resolution of this proceeding, considered together they clearly establish that Rippe does not possess the requisite qualifications to be a Commission licensee; therefore, the public interest would not be served by a grant of his application.

13. Accordingly, IT IS ORDERED, That the application of Herbert L. Rippe for an Amateur Radio Station license with a two-letter call and an Extra Class Operator license, filed March 8, 1972 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK,
Member, Review Board.

APPENDIX I

When the transcript of the June 28, 1973 oral argument was received on July 11, 1973, the argument presented by Mr. Gebhart, counsel representing the applicant, and substantial portions of the argument of counsel representing the Chief, Safety and Special Radio Services Bureau were missing from the record. At the Board's request, the Procurement Division of the Commission investigated the matter and ascertained that the recording equipment had malfunctioned and that the reporting company stood ready to pay such expenses as might be involved in a reargument of the cause. The parties were advised of the deficiency in the transcript by Order, FCC 73R–276, released July 30, 1973. That order also requested that the parties file comments and suggestions pertaining to further proceedings in the case on or before August 10, 1973. The Bureau submitted com-

[14] By letter of 9–4–73 Mr. Haupt withdrew from this proceeding.

ments which indicated that it was willing to rely on its brief and argument before the Board even though the transcript of much of its argument was lost. Counsel for Rippe, however, requested a new argument. The Board thereupon scheduled oral argument for October 2, 1973 at 10:00 A.M., FCC 73R–293, released August 17, 1973. On August 22, 1973, counsel for Rippe filed a motion to change date of argument. He indicated that due to other commitments he could not be in Washington on October 2, and submitted a list of dates in October which would be convenient to him. By Order, FCC 73R–308, released August 29, 1973, the Board rescheduled the argument for October 4, 1973 at 10:00 A.M. On October 4, 1973, at 10:00 A.M. the scheduled argument was convened with Board Member Joseph N. Nelson, Acting Chairman, presiding. Bureau counsel was present, but counsel for Rippe was not. Board Member Nelson inquired into the reason for the absence and counsel for the Bureau responded that a secretary in his office had received word only a short time before that Mr. Gebhart had been caught in a traffic jam on the way to the airport and had missed his airplane. The argument was then continued pending further order of the Board. On October 12, 1973 counsel for Rippe filed a motion explaining his failure to appear on October 4, 1973, and requesting a change in hearing date. By order FCC 73R–356, released October 17, 1973, the argument was again rescheduled for November 8, 1973, at 10:00 A.M. The reargument was heard by the Board on that date.

APPENDIX II

Rulings on the Exceptions of Herbert L. Rippe

Exception No.	*Ruling*
1(a)	Denied. See footnote 12 of this Decision.
1(b)	Denied. The exhibit was introduced without objection by counsel for Rippe (Tr 289/17) as part of the Bureau's rebuttal case, and there is no indication that the applicant was in any way prejudiced by the Bureau's failure to exchange the complete document.
1(c), 1(d)	Denied. See paragraph 6 of this Decision.
1(e)	Denied. There is no indication that the involuntary acts of counsel were observed by the witness or in any way influenced his testimony.
2(a), (b), (c), (d).	Denied. See paragraph 5 of this Decision.
2(e)	Denied. The truth of the facts alleged in the document cannot properly be determined by the Administrative Law Judge or the Review Board in the absence of cross examination of the writer.
2(f)	Denied. The Presiding Judge's determination that the exhibit was immaterial to the issues is proper.
3	Denied. The Judge did not abuse his discretion in receiving these three exhibits and Rippe was not prejudiced by their receipt in evidence. Moreover, as to Exhibit 14, counsel for Rippe agreed to its receipt (Tr. 261).
4	Granted to the extent that the Administrative Law Judge did not accurately state the appropriate standard of proof. Denied in all other respects; the error was harmless, since the Judge actually placed a more lenient burden on the applicant than he should have, and, more important, the applicant did not meet the appropriate standard, i.e. to prove his case by a preponderance of the evidence.
5	Denied. The findings of fact complained of fairly reflect the record and the conclusions complained of reasonably flow from the findings in the Initial Decision.
6	Denied. The Judge's evaluation of the testimony of Mr. Rippe set forth in conclusion 12 fairly reflects the record.
7	Denied. The Judge sets forth with great care the testimony of witnesses Bumgarner, Chapman and Everett in his findings of fact and adequately considered their testimony in arriving at his conclusion.
8, 10	Denied for the reasons set forth in this Decision.
9	Denied. See paragraph 9 this Decision.

F.C.C. 72D-61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HERBERT L. RIPPE, 3785 SUSANNA DRIVE, CINCINNATI, OHIO 45239 For Amateur Radio Station and Extra Class Operator Licenses in the Amateur Radio Service	Docket No. 19270

APPEARANCES

David E. Gebhart, on behalf of Herbert L. Rippe; *Vergil W. Tacy*, *Christopher F. DeLaFleur*, and *Freda J. Lippert*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued September 5, 1972; Released September 14, 1972)

PRELIMINARY STATEMENT

1. By an Order released June 20, 1971 (FCC 71-666), the Commission designated the above-captioned application filed March 8, 1971, for hearing, pursuant to Section 309(e) of the Communications Act of 1934, as amended, and Section 1.973(b) of the Commission's Rules, on the following issues:

1. To determine all of the facts and circumstances surrounding the preparation, execution and filing of an application for a two-letter call sign by the applicant on March 19, 1968,[1] including correspondence in respect to said application.

2. To determine the facts concerning representations made by Rippe in three applications for Amateur licenses filed in 1947.

3. To determine whether the applicant was issued a license in the Amateur Radio Service at Nashville, Tennessee, in 1942.

4. To determine, pursuant to the evidence adduced under the above issues, whether the applicant can be relied upon to operate his station in accordance with the terms of his license and whether the Commission can rely upon the representations made in his present application.

5. To determine, if the foregoing issues are resolved in favor of the applicant, whether the applicant is eligible for and should be granted a two-letter call sign.

[1] While several dates appear on the application, it was agreed on the record (Tr. 36-37), that the date February 28, 1968, identified the application.

6. To determine, in light of the evidence adduced pursuant to issues 1 through 5, whether the applicant possesses the requisite qualifications to be a licensee of the Commission.

Section 309 of the Communications Act (47 U.S.C. 309(e)) placed the burden of proceeding with the introduction of evidence and the burden of proof on the above-stated evidential issues 1 through 3 upon the applicant.

2. A prehearing conference was held on August 12, 1971. Hearing sessions were held from November 30, 1971, through December 2, 1971. The record was left open to permit counsel for applicant to determine (by January 14, 1972), whether additional evidence would be presented. On January 11, 1972, applicant's counsel filed a motion to close the record without any further hearing. Accordingly, the record was closed by an Order (FCC 72M–52), released January 13, 1972. Pursuant to a motion filed by Bureau counsel on January 20, 1972, the record was reopened, Bureau Exhibit 19 was received in evidence, and the record was reclosed by Order of the Examiner (FCC 72M–169), released February 4, 1972.[2]

3. Proposed findings of fact and conclusions were filed by the Bureau on April 3, 1972,[3] and by the applicant. A Reply was filed by the Bureau on April 17, 1972; the applicant did not file a Reply.

FINDINGS OF FACT

The Applicant

4. Herbert L. Rippe, the applicant, is 42 years old. At present he resides in Cincinnati, Ohio, where he is employed as District Data Center Manager for International Business Machines Corporation (IBM). Mr. Rippe is in charge of IBM District 9 which encompasses approximately two states having a total of nine data center offices. As District Manager, Mr. Rippe controls all the computers in his district and has the responsibility for several millions of dollars worth of computer installations. He has some 14 professional employees under his direction, maintains his own records, has control of the budgets for the various offices, and is in charge of their general operations. Mr. Rippe has been District Manager for over three years (Tr. 52, 54).

5. Mr. Rippe's first employment upon graduating from high school was with a sound company. Then, when he was 19 years old, he was employed as an engineer with TV station WKRC–TV in Cincinnati and thereafter with RCA Service Company. In 1950, he entered upon military service with the Air Force in technical fields for almost two years. Upon receiving his discharge from military service, he was employed for another two years in research with the Air Force and then returned to Station WKRC–TV. He joined the IBM Company in 1955 as a computer engineer, next became a system engineer and subsequently was a staff instructor for two years until he became the District Data Center Manager. Mr. Rippe has held several security

[2] Upon motion of the Bureau, the transcript was corrected by an Order (FCC 72M–190), released February 10, 1972.

[3] The Bureau filed corrections to this pleading ("Errata") on April 6, 1972.

clearances in connection with his military service, civilian employment with the Air Force and his employment with IBM (Tr. 52–54).

FCC Licenses Held by Applicant

6. Mr. Rippe has at various times held FCC licenses in different services. He testified that he received an Amateur operator's license in 1942 (Tr. 55).[4] He was issued a station license and an operator's license (both amateur) in 1947.[5] In 1948, Mr. Rippe received a second class radio telephone (commercial) license and in 1949, a first class radio telephone (commercial) license. The first class license was last renewed in 1968 and will expire November 21, 1973. In addition he held a Citizens Band (CB) license issued in 1964 which expired in 1969 and was not renewed by him (Tr. 55–57).

Applicant's Activities in Radio

7. Mr. Rippe has been a member and was at one time (subsequent to 1967) president of the Ohio Valley Amateur Radio Association, a club of licensed amateur operators in the Cincinnati area who are interested mainly in DX (long distance) communications and participation in DX contests (Tr. 90, 197–200), involving contacts with amateurs in foreign countries. He was involved in amateur radio operations to the extent that it was almost a daily activity on his part (Tr. 197).[6]

The 1968 Application for Two-Letter Call Sign

8. In November of 1967, soon after Thanksgiving Day, the applicant wrote a letter to the Commission stating in essence "that he had been licensed in 1942, that he had misplaced the license and could not find it; and that he would like to have verification of that license because he intended to apply for a two-letter call sign." This letter resulted from the applicant's learning of the Commission's new incentive licensing procedures which allowed a two-letter call sign to be issued to those Amateur licensees who had been licensed for twenty-five years or more (Tr. 91–92). The applicant testified he believed he was entitled to a two-letter call sign because he was licensed in 1942 and held an amateur extra class license at the time of writing (Tr. 92). He thought that a two-letter call sign would be advantageous for DX operation (Tr. 92).

9. About mid-December of 1967, Mr. Rippe received a response from the Commission; his own letter of request was attached thereto. The response was a form letter, with the section pertaining to two-letter calls circled in red (Tr. 92–93; 206). The encircled material stated what was required to qualify for a two-letter call (tr. 206). Among other things, the Commission's response requested submission of proof of the prior licensing claimed by Mr. Rippe (Bureau Ex. 3, p. 3). After reading the reply from the Commission, he became dis-

[4] The question of whether he received a 1942 license is in issue in this proceeding.
[5] Mr. Rippe's Amateur (Extra Class) operator's license was suspended by the Commission in March 16, 1969 for the balance of its term (June 4, 1970). His Amateur radio station license (W8DE) was revoked February 16, 1970.
[6] Mrs. Rippe is a licensed amateur operator. One of Mr. Rippe's sons also is the holder of an amateur license, and two other sons have novice licenses (tr. 198).

gruntled and threw the Commission's response and his own letter in a trash can (tr. 93).

10. The applicant then prepared and submitted an application, FCC Form 610, requesting modification of his existing Amateur radio station and Operator's license, W8BQH, Extra Class by assignment of a two-letter call (Bureau Exhibit 1; tr. 93, 155–157). The applicant signed and dated this application with the date "12/8/68" (Bureau Exhibit 1). This application was filed with the Commission's Gettysburg office on February 28, 1968 (Bureau Exhibit 1; tr. 36–37).[7]

11. Along with his 1968 application for a two-letter call, the applicant submitted two photo copies of Commission license documents (Bureau Exhibit 1). One of these was a copy of his active amateur license. The other document purported to be a copy of an Amateur Radio Operator's license issued to the applicant on December 4, 1942 (Bureau Exhibit 1). By its terms, the purported license was valid for five years from the date of issuance (Bureau Exhibit 1).

12. Following his submission of the 1968 application and the supporting license documents mentioned above therewith, Mr. Rippe was issued in March, 1968 an Amateur Extra Class license assigning the call letters W8DE (Tr. 97–98).

13. Subsequent examination of the 1968 application led the Commission to address a letter to Mr. Rippe on June 20, 1969 (Bureau Ex. 10). This communication noted that the applicant had submitted a photocopy of a license document in support of his claim of eligibility for a two-letter call, whose issuance date was December 4, 1942. The letter then stated: "Our records show December 4, 1947, as its issuance date." Mr. Rippe was requested to furnish information as to the basis of his claim that he was eligible for a two-letter call sign. He was also asked to "include the original license document from which the photocopy was made."

14. In response to the Commission's letter of June 20th, the applicant submitted a letter dated July 5, 1969, claiming another Amateur licensee, a DX competitor, had been trying to discredit him, and stating, *inter alia:* "When I first learned the new rules governing two-letter calls, I spent considerable time trying to locate my original operators license. I was unable to find the original only two photo copies which were made at an earlier date. One of these copies was sent with my two letter call application and the other is still in my possession. I believe these copies to be an exact reproduction." (Bureau Exhibit 2; Tr. 98–99, 190).

15. However, as was established by the applicant's testimony at the hearing, the document submitted by him as proof of a 1942 license (Bureau Ex. 3, p. 3), was not a photocopy of an original 1942 licensing document (tr. 94).[8] He explained that after receiving the form letter from the Commission in response to his request for verification of a 1942 license issued him, he "thought about it for a long time" (Tr. 93)

[7] While several dates appear on the application, it was agreed on the record that the date February 28, 1968, identified the application (tr. 37).

[8] The applicant was asked: "And, in fact was this a copy of your 1942 license?" He answered, "It was not a copy of my 1942 license" (Tr. 94).

and "did decide to create a license that simulated my 1942 license" (Tr. 95).

16. The decision led to action. For, Mr. Rippe admitted, "I manufactured a replica of my 1942 license and sent that in with the document" (Tr. 93). The alleged copy of a 1942 license submitted by the applicant was in fact a Xerox copy of another Xerox copy of his 1947 license document (Rippe Ex. 1). Mr. Rippe altered the Xerox copy of the 1947 document to manifest a date of issue of December 4, 1942, rather than the issue date of December 4, 1947 (Tr. 94–96). The fabrication was accomplished at night after working hours when he was alone (Tr. 95).

17. Mr. Rippe, when asked at the hearing, "Why did you do this?", gave the following response: "Because I could not find my 1942 license, and I . . . and I held one, and I felt that I was qualified for the two-letter call, and no one would come to my aid to help me locate that license." (Tr. 99). After receiving the Commission's reply to his request for verification of his licensing he did not seek further assistance from the Commission. According to Mr. Rippe, fellow amateurs had told him he could expect very little aid from the Commission (Tr. 208).

18. Mr. Rippe gave the following explanation for the statement in his July 5, 1969 letter that he believed the fabricated document submitted by him in support of a two-letter call to be an "exact reproduction" of a 1942 license. He testified that when he wrote the July letter, he had spent considerable time in making sure it contained true statements. Therefore he had looked up the dictionary definitions of "exact" and "reproduction" and determined from them that the phrase "exact reproduction" meant a "thorough reconstruction" or "thorough likeness". Therefore, he testified, "even though I knew I didn't do right by creating a license, I felt that that was a true statement because it was a thorough reconstruction or a thorough likeness of my 1942 license." (Tr. 98–99).

19. On November 6, 1969, the Chief, Safety and Special Radio Services Bureau, released an Order suspending the applicant's Extra Class Amateur Operator's license for the remainder of its term (Rippe Ex. 14). This Order alleged, *inter alia*, that the applicant had not been an Amateur radio operator licensee for 25 years prior to the filing of his application for W8DE, which fact he knew, and that he had fraudulently obtained a license for a two-letter call in violation of Section 97.129 of the Commission's Rules.[9] (Rippe Ex. 14). The applicant received this Order (Tr. 99). By its terms, the Order became effective fifteen days after receipt unless the licensee made written application for a hearing.

20. On November 6, 1969, the Chief, Safety and Special Radio Services Bureau, also released an Order to Show Cause looking toward the revocation of the applicant's Amateur radio station license for W8DE. The applicant received this Order (Tr. 99). By letter dated November 21, 1969, the applicant replied to the Show Cause Order

[9] Section 97.129 states: "No licensed radio operator or other person shall obtain or attempt to obtain, or assist another to obtain or attempt to obtain, an operator license by fraudulent means."

(Bureau Ex. 3; Tr. 99–101). This response contained the applicant's waiver of his right to a hearing and a statement in mitigation (Bureau Ex. 3). The applicant stated, *inter alia*, that he felt he "had the right to make my own justice" as a result of the Commission's negative response to his letter seeking verification of the date of issue of his first Amateur license document (Bureau Ex. 3). He asserted too that he felt that the form sent to him requesting further proof of prior licensing was a very cold and mechanical answer. The application went on to state that he made his own justice by "manufacturing a zerox (sic) license with a 1947 (sic) issue date"[10] and submitting it with his 1968 application for a two-letter call (Bureau Ex. 3). Further, he stated: "I had afterthoughts and knew I was wrong." (Bureau Ex. 3). The Amateur radio station and operator license for W8DE was enclosed. At the hearing under cross-examination, the applicant testified that he could not defend what he had done and "I decided that I was no worse than the Bureau; if the Bureau could not substantiate the license I would create one." (Tr. 167).

21. By Order released January 5, 1970, the license for Amateur radio station W8DE was revoked for willful violation of Section 97.129 of the Commission's Rules, effective February 16, 1970 (Rippe Ex. 13). It was noted in the Order that the licensee had waived his right to a hearing.

22. By letter dated June 4, 1970, the applicant, referring to the manufactured xeroxed document submitted with his 1968 application stated: "I would like again to apologize for my poor judgment and actions." (Bureau Ex. 4). The applicant enclosed an application for renewal of his amateur license.

23. The applicant submitted a letter dated July 15, 1970, again apologizing for his poor judgment and actions (Bureau Ex. 5). He continued: "It is difficult to express in words the feeling we encounter when unjustly denied a right due to lack of proper record retention. This is the only justification I can give for my actions." He stated too that for various reasons outlined by him that he felt cheated and justified falsification to provide his own justice. He then said: "When challenged by the Commission I did not wish to perpetuate this any further and I admitted the act."

The Three 1947 Applications for Amateur Licenses

24. In 1947, the applicant submitted three applications, FCC Form 610, for an Amateur Operator and Station license to the Commission and took an examination in conjunction with each (Bureau Exs. 6, 7, and 8; Tr. 93). The first of these applications was signed and dated by the applicant on April 2, 1947 (Bureau Ex. 6). The applicant failed the code portion of the examination given in connection with this application (Bureau Ex. 6; Tr. 73–74, 181). The second application was signed and dated by the applicant on July 18, 1947 (Bureau Ex. 7). The applicant again failed the code portion of the examination given in conjunction with this application (Bureau Ex. 7; Tr. 75, 183).

[10] The date of 1947 was a typographical error and the applicant meant the figure to read 1942 (Tr. 166).

The third application was signed and dated by the applicant on October 28, 1947 (Bureau Ex. 8; Tr. 184). On this attempt, the applicant successfully completed the examination given in conjunction with the application (Bureau Ex. 8; Tr. 75). As a result of this application and examination, the applicant received an Amateur Radio Station and Operator's license with the call sign W8BQH and Class B operating privileges (Rippe Ex. 1; Tr. 76).

25. Item 6 on each of the three aforementioned applications submitted by the applicant to the Commission in 1947 required that an applicant list the "*radio operator license(s)*" which the applicant "now holds or have held within 5 years" (Bureau Exs. 6, 7 and 8). There is a space provided in connection with Item 6 for the applicant to fill in the "CLASS", "SERIAL NO., IF ANY" and the "DATE OF ISSUANCE" of those licenses listed (Bureau Exs. 6, 7 and 8). On each of the three applications, the applicant Rippe did not list or indicate in any manner, in Item 6 or elsewhere, that he then held or had held within 5 years a radio operator license (Bureau Exs. 6, 7 and 8; Tr. 182, 184–185).

26. Item 10 on each of the applications submitted by the applicant to the Commission in 1947 required that an applicant indicate, by marking the appropriate box, whether he was applying for a "New", "Renewed", "Modified" or "Duplicate" Operator and/or Station license (Bureau Exs. 6, 7 and 8). There were also boxes for the applicant to indicate the appropriate class of operating privileges applied for (Bureau Exs. 6, 7 and 8). On each of the three applications, *the applicant Rippe checked or marked the box "New"* and he also checked or marked the box for Class B privileges (Bureau Exs. 6, 7 and 8; Tr. 182, 184–185).

The 1942 License Issue

27. Herbert L. Rippe was born on August 30, 1929 (Bureau Exs. 6, 7 and 8). He and his father first became interested in amateur radio in 1941 while attending a demonstration held by a boy scout troop (tr. 57–58). At that time he was 12 years old (tr. 59), and resided in Bend Hill, a Cincinnati suburb, where he was in the fifth grade of school. Father and son decided to obtain an amateur operator's license. Equipment was obtained and they practiced code transmission and reception (tr. 58).

28. Mr. Rippe testified that early in 1942 [11] he took an examination for an amateur license in Cincinnati, Ohio (tr. 6).[12] He stated that the examination was held in a building in downtown Cincinnati located on a steep hill and fairly close to the river somewhere between First Street and Fifth Street, he "would say" (tr. 60–62). He said that somewhere between 7 and 10 persons took this examination. He testified too that the examination did not last very long for him because he failed the code receiving portion which was immediately graded and he was then dismissed (tr. 62–63).

[11] The Examiner asked Mr. Rippe, "You were 13 years old then?" He answered, "Yes." (tr. 60).

[12] According to Rippe, the father was unable to prepare for the examination adequately because travelling in connection with his employment took him away from home and so he did not take the examination (tr. 60).

29. In preparation for the examination in Cincinnati in early 1942, the applicant asserts, he was required to submit fingerprints (Bureau Exs. 17; Tr. 64, 67). The fingerprints were taken at the Norwood Police Station, he stated, (tr. 64). The applicant in his testimony, remembers the circumstances "very well" (tr. 64). The applicant further asserts that he and his father entered the police station through the back door, there were two sets of stairs to go up, an officer took the applicant's prints and signed the fingerprint card and this card was taken and submitted to the Commission, thereafter by the applicant's father (tr. 64–65, 161–162).

30. In his testimony, the applicant stated too that he continued studying as he had done before the examination in Cincinnati (tr. 60). Further, he claimed that he took a second amateur examination given in Nashville, Tennessee, in 1942 (tr. 63). The applicant did not remember the exact date of this examination, but he believes it was given on November 20, 1942 because he looked it up in a QST publication which showed that date (Rippe Ex. 12; Bureau Ex. 11; tr. 64–65, 149–151, 210–211). He stated: His father decided he was ready to take the examination again; Tennessee was in his father's territory; his father took care of all the details when he would go to the examination and took him on the father's travels to Tennessee (tr. 64). The applicant said he was not fingerprinted again for this examination (tr. 66). He felt "fairly certain" and "thinks" that the prints taken for the Cincinnati examination were returned to his father after he failed that examination (tr. 66–67). The applicant did not remember if the fingerprint document was hand-carried or mailed ahead for the Nashville examination (tr. 65, 162). Further, the applicant testified that: the Nashville examination was given in a building and tables were used rather than school-type desks with writing arms (tr. 68); the building was downtown (tr. 68); the test was taken in Nashville for his father's convenience (tr. 65); and, the applicant and his father were in Nashville for two days (tr. 65). The applicant also testified that: the day of the examination, the applicant went to a cafeteria after the examination and was allowed to select his own food (tr. 69); the next day the applicant was sent to a movie (tr. 65); and "then we came back the following day to Cincinnati" (tr. 65). The applicant does not remember the name of the examining officer who gave the Nashville test (tr. 163).

31. In response to the Commission's letter of June 20, 1969 (Bureau Ex. 10), the applicant's letter dated July 5, 1969 (Bureau Ex. 2) stated, *inter alia*, that (a) he passed the Amateur Examination in Nashville, Tennessee, in 1942; (b) as a result of this test he was issued an "operator's permit" only; (c) no call sign was issued; (d) he was 13 years old when first licensed; (e) sometime in early 1942, he failed an Amateur examination in Cincinnati, Ohio; (f) he believed "my fingerprints were submitted when applying for my license since I remember my father taking me to the police station to have this done"; (g) his father had a "SX 28" receiver which he (the applicant) used until it was sold to the government in early 1943; (h) he forwarded the 1942 operator's license to the Commission the day after taking a 1947 examination "in an envelope supplied by a radio inspector"; and (i) the 1942 license was returned to him stamped "cancelled" when he received his 1947 license (Bureau Ex. 12). In the same letter, the applicant indicated that

when he took the 1947 examination in question, he told the FCC inspector about his 1942 license, was told he would not have to be reexamined even if that license had expired "since the FCC would accept any license issued during the war years, and since he did not have a copy of the 1942 license with him, he took the examination anyway.

32. In his letter of July 21, 1970 to the Commission, the applicant stated: "The examination that my license was obtained under was taken in late 1942 in Nashville, Tennessee." (Bureau Ex. 12).

33. In his letter of May 14, 1971, the applicant, stated, "I am sure that the Nashville November 20, 1942, date was when I first passed my Amateur examination." (Bureau Ex. 11). Attached to this letter was a copy of a page from the February, 1942 QST Magazine listing Nashville, Tennessee, as an Amateur examination site on February 20, May 15, August 21 and November 20, 1942.

34. The applicant claims that he learned the results of the Nashville examination sometime shortly before December 11, 1942 (Tr. 69). He stated in his testimony that his mother called to him and told him that his license had been delivered (Tr. 70). In this connection, he testified, ". . . and the reason she knew this was because we had discussed this earlier that if it was a big envelope it would have been, you know, sorry, and if it was a small envelope, it would have been the license, and it was a small envelope a little bit larger than an amateur license." (Tr. 70). Further, testimony by the applicant revealed, "Anyway, as I opened it up I can remember it was the first time I had ever seen an actual amateur license, and as I opened the thing up and looked at it I was looking for a call, and it was (sic) no call." (Tr. 70).

35. According to the applicant, his father was storing the 1942 license after it was issued to him (tr. 78). The applicant testified that when he had completed the 1947 examination which was successfully taken, he handed in the examination papers to the FCC representative, a Richard Cotton.[13] A converstation ensued, Mr. Rippe stated, and at that time he told Cotton that he had been issued a license in 1942. Applicant further testified that: he was advised by Cotton that any license issued in the war years would be still valid and then Cotton asked if he had the license; that he replied he did not have the license with him; that Cotton gave him an envelope and asked him to send the 1942 license in to the Commission; that he mailed it in to the FCC; and that the 1942 license was returned to him stamped "cancelled" with his new 1947 operator license and his WHBQH call (Tr. 77–78).

36. Mr. Rippe further testified that: the 1947 operator's license received by him in January of 1948 has been in his possession since that time; when the 1947 license was received, he was living with his parents and it was stored in a desk which he had; and later on, after he was married, in 1951, his wife controlled the records and the 1942 license was stored by her in various desks and boxes through the years (Tr. 89, 217).

37. Mr. Rippe also testified that his 1942 license would have expired in 1945 and "that was what it actually said on the license, in 1945. Three

[13] Rippe testified that he remembered the name of Mr. Cotten because it was in correspondence received from the Commission and he had heard the name "so often" that "he (Cotton) is kind of a legend as an Examiner" (tr. 164).

year license at that time" (Tr. 74–75).[14] He stated at the hearing too that so far as he was concerned, his 1942 license had expired, and that's the reason I went and took the exam over again" (in 1947) (Tr. 78).

38. When Mr. Rippe resumed his testimony on the following day, December 1, he was asked whether he had been aware, when preparing the purported copy of his 1942 license in 1968, that 1942 licenses were valid in their face for only three years. He answered, "No, I was not." (Tr. 203). Mr. Rippe was then asked: "When did you become aware that a license issued by the Commission, in the Amateur Radio Service, was valid for only three years, if issued in 1942?" "When I received a copy of the license from the FCC. The exchange document" (Tr. 203–204).[15] When it was pointed out to Mr. Rippe by Bureau Counsel that he had testified as to his understanding in 1947 that a license issued in 1942 expired in three years, the witness did not attempt to explain or reconcile the contradiction evidenced in his December 1st testimony (Tr. 204).

39. Prior to August 7, 1946, the Commission's Rules (Section 12.47) required that the code portion of an amateur examination be written in longhand (Bureau Ex. 20). Mr. Rippe testified that he assumed he printed the code portion of the 1942 Amateur examination in block letters, using a pencil (tr. 176). He stated that he has always printed code (Ibid.). There was no evidence introduced as to whether submission of the code portion of an examination in printed form in 1942 would in practice have disqualified an applicant. On August 7, 1946, the Commission's Rules were amended to allow the code portion of the Amateur examination to be written in longhand or hand printed (Bureau Ex. 20).

40. Mr. Rippe met his wife, Louise, in 1948, when he was 19 years old (Tr. 81). He testified that he did not show her his 1942 license or his 1947 license before they were married in 1951, but that he did tell her he was an amateur radio operator and had been licensed since the age of 13 (Tr. 81–82). He sold his radio equipment sometime in 1949 and started up a station again in 1958, after buying a home (Tr. 83–84). In 1963, he became very interested in DX communications and then acquired an extra amateur class license by examination taken in 1967 (Tr. 83–84).

41. Mrs. Louise Rippe, wife of the applicant, was first licensed by the Commission in 1951 in the Amateur Radio Service (General Class) for Amateur radio station W8HDB (Rippe Exhibit 15; Tr. 225–226). The following year she qualified as an Advanced Class Operator and then acquired her third class commercial license (Tr. 226).

42. She stated that while going through the papers in his desk she found two licenses: one with an issue date of 1942 and another with an issue date of 1947 (Tr. 229). She said she compared these two documents by looking at them because she was "very intrigued" and wanted to "see the difference in the licenses" (Tr. 229, 254). She went on to say, "I don't recall of any difference" (Tr. 229) and that the first time she saw the 1942 license document was the only time she recalled seeing

[14] Mr. Rippe gave this testimony on December 30, 1971.
[15] The witness was referring to a document exchanged by Bureau Counsel as a proposed exhibit in advance of the hearing (Tr. 204).

that document (Tr. 231–232). Mrs. Rippe testified further that the 1942 license was almost torn in two so she put it in an envelope which was placed in a manila folder along with the other Rippe family FCC licenses; the folder was put away inside a small desk she was using at the time (Tr. 228–231). She stated also: that there were several domicilary changes between 1951 and 1967 when Mr. Rippe requested verification of a 1942 license; that Mr. Rippe asked his wife if she could locate his 1942 license; that she then made an extensive search but was unable to find that license; that three other licenses also placed in the manila folder were found there when required for renewals at various times; and that when other licenses were transferred to a black leather folder in 1965, she did not find the 1942 license in the manila folder (Tr. 230–238). Mrs. Rippe stated that she believed she would recognize the 1942 license if she saw it again, "because it was torn almost in half and that was the reason it had been placed in the envelope" (Tr. 239).

43. The facts as disclosed at the hearing establish that a license document issued in 1942 would have been valid, on its face, for three years, whereas, a license document issued in 1947 would have been valid, on its face, for five years (Rippe Ex. 1; Tr. 203–204). Also, the evidence demonstrates that no call signs were to be issued in late 1942 (after September 15) and hence a license document issued at that time would not bear a call sign (Bureau Ex. 16). But, the license document issued in 1947 to the applicant did have a call sign (Rippe Ex. 1). The testimony of Mrs. Rippe also discloses that her original license document, issued in 1951, had been misplaced for a period exceeding fifteen months (Tr. 241–249). She had taken it out of a folder and misfiled it in a desk (Tr. 225). She stated to the Commission in a letter dated February 3, 1970, that due to "many moves, she had lost not only her husband's original license, but also her own". (Bureau Ex. 13). She could not locate her license document when she searched her files on February 3, 1970 (Tr. 243–244). However, she did locate her original license document at least ninety days prior to December 1, 1971 (Tr. 249).

44. If the applicant was issued an Operator's license by the Commission upon the successful completion of an Amateur examination in Nashville, Tennessee, in 1942, a copy of that document would be filed in the Commission's inactive alphabetical file of name cards reporting issues of Amateur radio operator and station licenses for the period 1934–1954 (Rippe Ex. 16; Tr. 273, 276, 325–326). This grouping of Commission records was transferred to the Federal Records Center, presently located in Suitland, Maryland, in 1955 (Tr. 273, 276). This grouping of records is identified by the Accession No. 60–A–419 (Rippe Ex. 16; Tr. 279). These records are stored in numerous boxes at the Federal Records Center (Rippe Ex. 16). The copy of a license document of 1942 issued to applicant Rippe would normally be found in Box 42 of Accession No. 60–A–419 (Rippe Ex. 16; Tr. 273–276, 279). Each box contains several thousand copies of license documents which are each the size of a 3 x 5 card (Tr. 279–280). These records are the Official Minutes of the Commission (Tr. 274).

45. On two occasions, at least, members of the Commission have conducted a search of its records to determine therefrom, whether in fact, an operator's license was issued to the applicant in 1942 (Tr. 269). The first search was made by Mr. Paul Kiefaber, Section Chief of the Amateur Group, in connection with the Commission's earlier revocation proceeding involving the applicant (Rippe Ex. 13; Bureau Ex. 3; Tr. 269). The Federal Records Center was initially requested to search the appropriate Commission records for a 1942 Amateur license document issued to the applicant (Tr. 272). The response from the Federal Records Center was no such record was present (Tr. 272). The Commission then requested that Box 42 be sent to its offices and Mr. Kiefaber went through the box to check the Federal Records Center's negative report (Tr. 272). Mr. Kiefaber's personal search also confirmed that the Commission records did not disclose the document (Tr. 272, 394). Since the Order of Revocation was released January 5, 1970, it can be inferred that Mr. Kiefaber's search and the preceding search by the Federal Records Center personnel were made in late 1969 (Rippe Ex. 13).

46. The second search was occasioned by preparation for this proceeding (Tr. 270). A request was submitted to the Federal Records Center about July 7, 1971, for the copy of the applicant's 1942 license document (Rippe Ex. 18; Bureau Ex. 15; Tr. 270, 285, 288–291). As a result of this request, the Federal Records Center returned a license document [16] issued to Herbert L. Rippe in 1947 and a license document issued to Herbert Louis Rippe in 1948 (Bureau Ex. 15; Tr. 289). Again, no license document for 1942 was returned (Bureau Ex. 15; Tr. 272, 288–289). To verify the Federal Records Center's second negative response, Mr. Richard Everett, Acting Assistant Division Chief of the Amateur and Citizens Division, went to the Federal Records Center about September 30, 1971, and personally searched Box 42 (Tr. 270, 272). Mr. Everett searched that specific place in Box 42 where a document for R-I-P-P-E should be filed, also checking a number of cards in either direction from that spot (10 cards or so) to see if there had possibly been a misfiling and the bottom of the box in case the document for the applicant was loose and had fallen to the bottom (Tr. 279–281). Mr. Everett did not find in Box 42 a document in the applicant's name issued in 1942 (Tr. 272, 343, 348). Nor did he find a charge card indicating that a record of a 1942 license issued to Mr. Rippe had been renewed (Tr. 341).

47. During the course of the hearing, and at the request of the Examiner, Mr. Jack Bumgarner, Chief of the Reference Section of the Federal Records Center (Tr. 298), was to conduct an additional search of the Commission's Amateur records, Accession No. 60–A–419, for a copy of a 1942 license document issued to the applicant (Tr. 376–378, 405–406). This search was to be under the names of Louis and Herbert (Tr. 405–406). The results of this search, reported under dates of January 12, 1972, established that no record of a license issued to Mr. Rippe in 1942 (Bureau Ex. 19) was to be found under the name of

[16] This document bore an operator's license on one side and a station license on the reverse side (Tr. 295).

Herbert, Lewis or *Louis*. Mr. Bumgarner also caused a complete search of the cards in Box 42 to be made, "card by card", and no record of issuance of a 1942 license to Rippe was found (Tr. 410).

48. As indicated above, the Commission's inactive alphabetical index files located at the Federal Records Center contain license information from 1934 through 1954. The inactive alphabetical index files covering license information from 1955 are maintained in the Commission's Gettsyburg, Pennsylvania, office. Mr. Everett also caused a search of these files at Gettsyburg to be made. Three license documents issued to the applicant, all of which bore expiration dates subsequent to 1955, were located as a result of this search; no 1942 license document for him was found (Tr. 275–276, 319–320).

49. Further, Mr. Everett directed an inquiry to the American Radio Relay League, an amateur organization, to ascertain if they had a record indicating Rippe had been licensed in 1942. He received a negative answer (Tr. 352).

50. As stated above, while the Federal Records Center was requested to forward a 1942 license document (Rippe Ex. 18, Bureau Ex. 15), the Commission received only other licenses documents: (a) an Amateur Operator License Record in the applicant's name; (b) an Amateur Station License Record in the applicant's name; and (c) another and later license document in the applicant's name (Bureau Ex. 15; paragraph 32, *supra*). The fact that documents, other than the one requested, were returned to the Commission is not an unusual or extraordinary response to a request (Tr. 284, 404).

51. In reference to those documents returned by the Federal Record Center pursuant to the Commission's request (Bureau Ex. 15; Rippe Ex. 18) the letter "N" which is located in the upper right-hand corner of the Amateur Station License Record bearing the applicant's name and the call sign W8BQH indicates that this license document is a new Amateur radio station license and the number appearing as 12–4–47 is the date of issue of the document (Bureau Ex. 15; Tr. 293). The letter "M" which is located in the upper right-hand corner of the license document bearing the applicant's name indicates that this document is a modification of an earlier license document and the number 12–4–48 in the lower right-hand corner is the issue date of the document (Bureau Ex. 15; Tr. 294–295). The third document, an Amateur Operator License Record, is the reverse side of the first document mentioned above and contains the licensee's operating privileges (Tr. 295). The letter "N" which is located in the upper right-hand corner indicates that this is a new operator license and the numbers 12–4–47 indicate the date of issue of this document (Tr. 295).

52. A form consisting of three parts (Rippe Ex. 17) is used by the Commission to request license records from the Federal Records Center. The three parts each colored differently, are copies of the same document (GSA Optional Form 11). The top portion of the triplicate form is filled in by the Commission to initiate a request for a license document (Tr. 299, 302, 315; Rippe Ex. 18). After being received by the Records Center, the top (white) copy of the request form (Rippe Ex. 17) is retained in the Center for statistical purposes, the second (pink) copy serves as a route sheet (as a receipt copy for a classified

record), and the third (yellow cardboard) copy is used as a charge card left in the record box in the event a record is located and returned to the requesting agency. If a record that has been requested is not found, then the yellow copy is not left in the record box which was searched. Instead, the agency is told by phone that the requested document was missing as the yellow copy is returned to the agency with the block in the copy identified as "missing" check-marked (Tr. 300–303; 397–400).

53. When Mr. Everett made a search at the Federal Records Center, about September 6, 1971, for a 1942 license record pertaining to Mr. Rippe and found none, he was aware that three other Rippe licenses had been received by the Commission in response to a request for the 1942 document. He noted that Box 42 in which he searched did not contain a charge card reflecting withdrawal of the three Rippe licenses. Mr. Everett called the omission to the attention of Mr. Bumgarner. The latter then stated that the Center maintains for a period of time the requests for records received from federal agencies. Mr. Bumgarner proceeded to have an employee perform a search among a stack of request forms in the presence of Everett and himself. As a result of this search, a white copy of a request form pertaining to Mr. Rippe was found.

54. The white record copy of a request uncovered by the search (Rippe Ex. 18) was filled in by Commission personnel at the top. The information placed in Rippe Ex. 18 before it reached the Records Center was a hand-written request for a record of a license ("name card") issued to Herbert L. Rippe on "11–20–42". The request was dated "7–7–71" and was signed "McDonald". The record establishes that a female employee of the Commission in the Mailing Files Unit, Mrs. McDonald, is the person who transmits record requests to the Records Center (Tr. 270; 401). There was additional handwritten information in the bottom half of the form which had been written in by someone at the Records Center. These entries listed: opposite the document label, the number "1"; under time required, the entry "3 min;" and three letters under searcher's initials. Underneath this information was written the date "7–9–71". Mr. Bumgarner testified that this date reflected the date the request was serviced, and the preceding information indicated that the request was filled and the requested file, the name card for Herbert L. Rippe for the date 11–20–42, was sent to the Commission (Tr. 401, 404). Mr. Bumgarner testified further that it would be possible for other license records than a card pertaining to Rippe for 11–20–42 to have been sent to the Commission, and that the accuracy of the grades 3 to 5 searchers, is fairly good but it is not checked to see what was actually sent (Tr. 404).

55. After the white record copy (Rippe Ex. 18) was found, there was some discussion between Mr. Everett and Mr. Bumgarner as to why there was no yellow charge card in Box 42 when it was evident that three Rippe license records had been sent to the Commission. This discussion led to the making of a photostat copy of the white record (Rippe Ex. 18) after which the photostat was placed in Box 42 to replace the yellow copy which had disappeared: the stack of white copies of license record requests in which Rippe Exhibit 18 was found

104–019—74——8

was searched with reference to a time span of at least a month and nothing else regarding Rippe was found. Mr. Bumgarner conceded that the possibility that the three license cards (Rippe Ex. 15, p. 2) could have been listed in another white copy of a record request filed among similar white documents covering a prior period. He also admitted that if a yellow charge out card for a license record was missing and the white copy was destroyed after its normal retention period of a year, he would have no way of knowing that the license record had been charged out (Tr. 408–411).

56. The Bureau, in the course of Mr. Everett's testimony, conceded that from the period of 1942 to and including the date of the hearing in this proceeding, it is possible that a record reflecting a license was lost, misfiled, or inadvertently destroyed (Tr. 334). However, Mr. Everett then testified that it is a probability if there is no license record on a particular individual then no license was issued to him (Tr. 335).

57. By Commission Orders, in 1942, an applicant for an Amateur radio station or operator license was required to file, along with the application form, a questionnaire regarding citizenship (FCC Form 735) and his finger-prints (FCC Form 735–A) (Bureau Exhibit 17; Tr. 360–361, 372–373).

58. Mr. Jack D. Robinson is employed by the Federal Bureau of Investigation as a fingerprint examiner. He is an assistant custodian of that Bureau's Identification Division files (Tr. 450–451). At his request, the Federal Bureau of Investigation's fingerprint records and cross-reference index records were searched for fingerprint data regarding the applicant (Tr. 456, 466–467). As a result of the request, fingerprint data of the applicant was located (Tr. 458). This data consisted of two prints (Tr. 456). One of these prints was a civil service print taken by the Air Force and the other print was in a file which is not related to Commission licensing (Tr. 460). Another print had been received between 1950 and 1953 (Tr. 461). This was an Armed Services print which had been returned to the contributor (Tr. 461). In addition, the name index cards showing receipt of all fingerprints were searched. This file also disclosed that no fingerprints of the applicant were received as a referral from the Commission (Tr. 467).

59. The Federal Bureau of Investigation's fingerprint records reflect numerous prints of other individuals taken in connection with the Federal Communications Commission on FCC Form 735–A, which form was required of all applicants for Operator's permits issued in 1942 (Tr. 458). None of the fingerprint records of the Federal Bureau of Investigation, pertaining to the applicant, were the result of the referral from this Commission on FCC Form 735–A for licensing by this Commission (Tr. 458).

60. The Federal Bureau of Investigation is in the process of deleting some of its fingerprint records (Tr. 463). However, that section of the Federal Bureau of Investigation's fingerprint records where the applicant's fingerprints are filed had not, at the date of the hearing, been subject to this deletion process (Tr. 464).

61. The Federal Bureau of Investigation's view is that if there is no record, no fingerprints were received (Tr. 466). Mr. Robinson

testified, however, that there is a remote possibility that fingerprints of Mr. Rippe received in 1942 could be misfiled (Tr. 465).

62. Mr. Clayton Chapman is employed with International Business Machines (IBM). He testified on behalf of the applicant as an expert witness in the field of record management and record keeping (Tr. 431). Mr. Chapman had made a study of the Commission's system for keeping records pertinent to this proceeding. His studies were based upon answers to interrogatories propounded by the applicant's counsel and a study of the Commission's records system concerning those files presently kept by the Federal Record Center located at Suitland, Maryland (Tr. 424–425). Based upon his study and analysis and specifically his examination of Box 42 of the records at the Federal Record Center, Mr. Chapman was of the opinion that he could not state whether a card evidencing an Amateur license issued in 1942 to Mr. Rippe was in Box 42. Mr. Chapman further stated that he was unable to state, based upon his investigation, whether Mr. Rippe was issued a license in 1942 (Tr. 427). Conversely, Mr. Chapman was not able to state that he was not issued a license in 1942 (Tr. 428). Mr. Chapman's opinion included his evaluation that the manual system used by the Commission was a poor one. In this connection, he pointed out: that there was no control sheet to permit checking the contents of Box 42 to insure that was supposedly sent to the Federal Records Center is still there; that there was no arrangement for a periodical audit to ensure that the records in Box 42 are still there and in sequence; and that there was no provision made for a central apparatus by which to reconstruct the information in Box 42 if the records in it are destroyed either inadvertently or on purpose. (Tr. 428–429).

63. He again concluded that, in his opinion, no one could tell from the contents of Box 42 whether Mr. Rippe was licensed or not in 1942 (Tr. 432). In support of this conclusion, Mr. Chapman noted that there was "poor control" over Box 42 as evidenced by the circumstance, according to him, "there apparently is a missing charge sheet". Furthermore, he stated, there is some question as to whether the Records Center had followed their own procedures in filling out a charge sheet. He pointed out that in a "good control situation" there is an easy determination as to what agency and individual received records when a charge sheet is placed in a box. Moreover, he testified, in a good control situation, there would be a periodical check of the record box, a determination made that there were charge sheets for records not returned which had been there for some time, and an investigation made as to who had those records (Tr. 432).

64. Mr. Chapman was asked by counsel for Rippe what Rippe Ex. 18, the white record document in Box 42 pertaining to the applicant, indicated to the witness in light of his familiarity with the license records filing system. After reciting the details of information which appeared on Rippe Ex. 18, Chapman stated his conclusion as follows: "It appears there has been one document filed for Mr. Rippe dated 11–20–42." (Tr. 434). Mr. Chapman, in forming his opinion, had "discounted" the testimony of Mr. Everett (Tr. 392) and Mrs. Carole Green (289–291) concerning the fact that in response

to a request for 1942 license information concerning the applicant, the Federal Record Center had returned three license documents dated subsequent to 1942. By "discounting" this testimony, Mr. Chapman explained that he had based his opinion on his understanding of the Federal Record Center procedures and what is stated in Rippe Ex. 18, and that document alone (Tr. 435–436).

65. The integrity, reliability and admirable accomplishments in applicant's employment, both with industry and the U.S. Air Force, have been attested to by his superiors and an associate (Rippe Exs. 6, 7 and 10). For example, the last-mentioned individual has stated concerning Mr. Rippe: "In my relationship with him, I have worked very closely in implementing controls and procedures necessary to operation in a confidential and restricted environment. * * * In my dealing with Mr. Rippe, I have come to respect his judgment and integrity in the operation of our business". (Rippe Ex. 6). Again, a former supervisor has stated that the type of work performed by Mr. Rippe "required the highest integrity". Noting that Mr. Rippe did a "very credible job" during the seven years of working with him, this individual added: "He was considered a very reliable employee, and I never had any reason to question his honesty, integrity and loyalty" (Rippe Ex. 7). The concluding statement was that because of his sustained performance through the years, Mr. Rippe had been promoted to a managerial position (*Ibid*).

CONCLUSIONS

1. The findings of fact clearly establish that the applicant obtained a two-letter call sign in the Amateur Radio Service by the preparation and submission to the Commission in 1968 of a bogus license document. The false document, which purported to be a copy of a 1942 amateur operator's license allegedly issued to the applicant, was manufactured by photostatic reproduction processes which involved alteration of information in a valid 1947 operator's license by changing the issuance date. That the method of fabrication employed resulted in no physical alteration of an original Commission license but was accomplished by making a reproduction of an altered photocopy thereof, makes the applicant's conduct no less reprehensible. The fabricated document was in any case submitted with the intention that it be accepted by the Commission as a true photocopy of a 1942 document, thereby establishing eligibility for a two-letter call sign under the Commission's Rules. Moreover, applicant's deception cannot be condoned because he received an unsatisfactory response from the Commission when he previously requested verification of a 1942 license. If indeed he had been issued a 1942 license, then the obvious course of proper conduct was for him to submit to the Commission such proof of that authorization as he could muster, just as he had plainly been asked to do in the Commission's answer to his verification request. Or, at the very least, some further written explanation from him to the Commission regarding the circumstances of acquisition and absence of the claimed license was required. He chose instead to create a purported copy of a 1942 license whose imperfection could

not bear scrutiny since he apparently overlooked the fact that 1942 operators' licenses were issued for a term of three rather than five years.

2. After the applicant was challenged regarding the authenticity of this photocopy by the Commission's letter of June 20, 1969, which notified the applicant that its records indicated December 4, 1947, not December 4, 1942, to be the date of issue, he continued to attempt to perpetrate his fraud on the Commission by stating, in his reply letter of July 5, 1969, that he was unable to find the original—"only two photocopies" thereof, and that he believed the photocopy submitted, to be an "exact reproduction" of his original (i.e., 1942 license). The only logical interpretation of his language in his letter was that the bogus license document was a true and exact photocopy of an original document which the applicant was unable to find. While the applicant testified that he checked the dictionary definitions of the words "exact" and "reproduction", to assure himself that their use would not constitute a false statement to the Commission, the fact remains that they were not a truthful statement and in the context of the preceding comments as to "two photocopies" of the original were demonstratably a misrepresentation.

3. The applicant did not admit his fraudulent actions until he replied to the Commission's Show Cause Order of November 6, 1969. In his reply, dated November 21, 1969, he disclosed that he manufactured the submitted bogus license document. Prior to issuance of the Show Cause Order, the Commission, by letter of June 20, 1969, had first raised the issue of the validity of the photostat copy of a license submitted by him. Therefore, the applicant misrepresented the facts when he stated, in his letter of July 15, 1970, that he had admitted his fraudulent actions and did not wish to perpetrate his scheme any further when "challenged" by the Commission.

4. The findings of fact reflects that in 1947, the applicant submitted to the Commission three separate applications for an amateur operator and station license and took an examination in connection with each. Item 6 in each application form requested the applicant to list the "radio operator license(s)" the applicant "now holds" or has held within 5 years. The applicant maintains he was issued an amateur operator's license by the Commission in December, 1942. By notice of a series of Commission orders, a license issued in 1942 for three years was extended until a comparable termination date in 1948,[17] yet in no instance did applicant indicate he had ever held a license. Applicant also checked a box, under Item 10 of each application, to indicate he was applying for a "new" license and did not mark a box bearing the designation "renewed". If, as applicant claims, he was issued a license in 1942, the responses in the 1947 applications which failed to indicate he had previously held an operator's license were factually inaccurate. Whether applicant was guilty of misrepresentations in his answers to Items 6 and 10 in the three 1947 applications turns on the resolution of the issue as to whether he had in fact been issued an operator's license in the Amateur Radio Service at Nashville, Tennessee, in 1942.

[17] See, FCC Order No. 115–C, Bureau Ex. 20, p. 4.

5. Section 309(e) of the Communications Act places the burden of proof with respect to the 1942 license issue on the applicant. His counsel contends that applicant is required to satisfy this burden by a "preponderance" of the evidence. He is mistaken. For, under Section 706 of the Revised Administrative Procedure Act (5 U.S.C. 706), the applicant must show by substantial evidence, taking into account the entire record including contradictions therein, that he was issued a license in 1942. *Universal Camera Corp.* v. *Labor Board* 3400 U.S. 474, 477–478 (1951).

6. A careful consideration of the entire body of evidence received in the record of this proceeding, consisting of some three days of oral testimony and numerous written exhibits presented by both applicant and the Safety and Special Radio Services Bureau of the Commission leads inexorably to the conclusion that the applicant failed to sustain his burden of proof under the 1942 license issue.

7. Applicant's evidential showing on the issue in question rests essentially upon: (1) the testimony of Mr. Rippe that he took an examination for an operator's license at Nashville, Tennessee, in November, 1942, and received a license from the Commission in December of 1942; (2) the testimony of Mrs. Rippe that she had seen the license, at one time had custody of it, and that it was lost; (3) the testimony of an expert witness in the field of record management as to inadequacies of Commission record procedures; and (4) the testimony of witnesses that the presence of a copy of a record found in the FCC record files at the Federal Records Center indicated to them a record of a 1942 license for Rippe had been filed there.

8. In testifying, both Mr. and Mrs. Rippe appeared to be earnest and sincere. Their demeanor on the witness stand afforded no basis for doubting their credibility. However, glaring contradictions and other flaws in Mr. Rippe's testimony together with evidence of his failure to indicate in 1947 applications that he had held a 1942 license as well as deception on his part in more recent dealings with the Commission impel the conclusion that his claim of having received a license in 1942, and of even having taken an examination in Nashville, Tennessee, cannot be credited. So too, in the case of Mrs. Rippe, significant weaknesses in her testimony and other considerations noted below affecting her credibility require the conclusion that her testimony regarding the existence of a 1942 license is not worthy of credence.

9. The testimony of the applicant, as the Bureau has observed, is fraught with inconsistencies. Among these are: (a) the applicant's testimony that he was thirteen years old when he first took an Amateur examination in Cincinnati in "early 1942" as opposed to the fact that he would not have been thirteen until late 1942, specifically August 30, 1942; (b) the applicant's testimony that he and his mother would know when the license document was delivered by mail because notification of failure would be in a big envelope, a little bit bigger than an amateur license as compared with his subsequent testimony that * * * "I can remember it was the first time I had ever seen an actual amateur license * * *."; and (c) his testimony that the 1942 license would have expired in 1945 because the license so stated, as opposed to his later testimony that in 1968 he was not aware that 1942 licenses were valid

on their face for only three years and that he did not learn of this fact until the prehearing exhibit exchange herein, and (d) his testimony that in 1947 so far as he was concerned his 1942 license has expired whereas he later testified that as late as 1968, he did not know that 1942 licenses bore a three-year term. This last inconsistency was called to applicant's attention by Bureau counsel but applicant made no attempt to explain the discrepancy. Also, in testifying, applicant stated that *after* having completed an examination in 1947, he then told the Examiner he had been issued a license in 1942. But, in a letter written to the Commission by applicant on July 5, 1969, he stated in effect that *before* commencing the examination in 1947, he had told the FCC examiner about his 1942 license. The Examiner (in the present proceeding) does not find a significant inconsistency in applicant's references to the number of days he allegedly spent in Nashville, nor is any decisional importance attached to applicant's statement that he had printed the code portion of the 1942 examination whereas the Rules then required longhand be used. The rule against printing may well have been more honored in the breach and there is no evidence as to whether this requirement was strictly enforced.

10. In filing applications on three occasions in 1947, the applicant each time failed to list a 1942 license, although the form required that licenses held "now" or within the past five years be mentioned. He indicated moreover he was applying for a "new" license and not a "renewed" license. Applicant testified that he was of the belief that the 1942 license had expired. While this could explain satisfactorily why he stated he was applying for a new license, it is not a convincing explanation for his failure to list the 1942 license. The Examiner finds it incredible that a person who was allegedly interested enough in amateur radio to apply not once, but twice, would not list a license he had previously held when specifically called upon by the later application form to do so.

11. Credence in Mr. Rippe's 1942 license claims is further diminished by his concocting and perpetration of a fraudulent scheme in 1968 to induce the Commission to issue him a two-letter call sign. It is noteworthy too that when first challenged about the validity of the bogus document submitted by him, he attempted to brazen through with his deception by continuing misrepresentation and admitted his guilt only when brought up short by a show cause order. Such false conduct is not calculated to induce confidence in his testimony that he had been licensed in 1942.

12. The applicant's wife, who received her amateur license in 1951, testified that the first and only time she saw her husband's 1942 operator's permit was in 1951 when she compared it with his 1947 license to see if there were any differences. She then testified, "I don't recall of any differences". However, the record and findings disclose that an operator's license issued in 1942 did not bear a call sign, whereas the license document issued to the applicant in 1947, representing both an operator's permit and station license, bore the call sign W8HBQ. Moreover, a comparison between a 1942 license and Mr. Rippe's 1947 license would have disclosed that a permit issued in 1942 was valid on its face for three years only, whereas the 1947 permit

was valid for five years. Moreover, applicant testified that his 1942 license had been stamped "cancelled." That Mrs. Rippe could not recall any of such striking differences casts grave doubt on whether she ever did see a 1942 license, bearing in mind too that she herself was a licensed operator in 1951, and hence not unversed in details of licensing information. Secondly, the fact that the applicant's wife said she saw the 1942 document only once, over twenty years ago, and the further fact that she would have a natural motive, not only as his wife, but as part of a family intensely interested in amateur radio, in lending support to applicant's claims, detract considerably from the weight to be given to her testimony. Her reliability as a witness is also adversely affected by her assertion that her own license had been lost in moving whereas it developed in her testimony at the hearing that the license had been misplaced and retrieved sometime before the hearing. In sum, no corroboration of the 1942 license claim can be drawn from Mrs. Rippe's testimony.

13. The record discloses that every conceivable pertinent official (and even unofficial) record source has been checked in an extensive effort on the part of Commission personnel to verify the issuance of a 1942 license to the applicant. The uncontroverted facts establish that a search of the Commission's records made in 1968, together with a further search conducted just prior to the hearing in this proceeding and another search conducted by personnel of the Federal Records Center as ordered by the Examiner during the course of the hearing, failed to disclose the issuance of such license in 1942. It is uncontroverted that if an operator's permit had been issued by the Commission in 1942, that, as a prerequisite, fingerprints of the applicant would have been required for submission to the Federal Bureau of Investigation and retained by that agency. The Federal Bureau of Investigation files disclose that no such fingerprints are on file and they do not reflect, upon a search of cross-reference name cards records, that applicant's fingerprints submitted in connection with an FCC examination were even received by the Bureau by way of referral from this Commission.

14. A document uncovered in Box 42 of FCC licensing records at the Federal Records Center, in which receptacle the record of a 1942 Rippe license should be found, is relied upon by the applicant as proof positive that he was licensed in 1942. This document (Rippe Ex. 18) is described in paragraphs 54 and 55 of the findings above. It is a photostat copy of a document obviously intended to serve as a charge card for a license record pertaining to the applicant. This record was construed by several witnesses as indicating that a record of a 1942 license document pertaining to the applicant had been found in Box 42 and inferentially removed. But this conclusion ignores evidence of circumstances which give the document in question dubious evidential value. First, the date "11-20-42" and the name "Herbert L. Rippe" were placed on the original (a request form for a document search) before it reached the Records Center. Secondly, in response to its request for a search to be made at the Records Center for a 1942 license, the Commission received not such a document, but two other documents evidencing later licenses issued to Mr. Rippe. There was

testimony that it is not an unusual occurrence for other records to be returned to the Commission in response to a request for a specific document. An official of the Records Center has stated that while the accuracy of searchers at the Center is "fairly good", it would be possible for other records than a 1942 license to have been sent in response to the Commission's request, and that no check would have been made at the Center after a search to determine what was actually sent. Highly significant too is the fact that a search made in Box 42 as early as 1969 found no record therein for a 1942 license. Moreover, the record in question (Rippe Ex. 18) was not originally located in Box 42 but rather among a pile of other search requests and it was not the usual yellow cardboard copy of the request form (Rippe Ex. 17) customarily left in a record box as a charge card. Its original was a white copy of the request form normally retained in the Records Center for statistical purposes. This white copy record pertaining to the request for a 1942 Rippe license bore illegible initials presumably written by the searcher, and no witness testified as to the particular search for a 1942 license and its outcome. All of the countervailing considerations recited above preclude a conclusion that the request and search document found in Box 42 necessarily evidences the issuance of a 1942 license. Thus, it must be held that there is no reliable documentary evidence that Mr. Rippe received a license in 1942.

15. The applicant presented testimony of an expert witness who discussed learnedly and impressively about the "poor" manual license record-keeping procedures of the Commission and their imperfections. Granting the validity of his criticisms about the procedures, still no assurance can be derived from his testimony that Mr. Rippe was licensed in 1942. Indeed, he conceded that, apart from the controversial document discussed above, no conclusion can be drawn from Commission records as to whether or not Mr. Rippe acquired a license in 1942. In the nature of things, ultimate reliance must be placed upon records where the testimony of witnesses do not confirm an event. In this case, the Examiner is forced to agree with the Bureau that the available records indicate conclusively no license was issued to Mr. Rippe in 1942.

16. Since, so far as can be determined from the record, no license was issued to Rippe in 1942, it must accordingly be concluded that no misrepresentations were involved in the filing of 1947 license applications wherein he failed to indicate he had previously been licensed by the Commission.

17. In view of the resolution of the 1942 license question (Issue 5) adversely to the applicant by reason of his failure to sustain the burden of proof in Issue 3, it is concluded that the applicant is not now eligible for and should not be granted a two-letter call sign.

18. The significant contradictions in applicant's testimony, the implausibility of his claim that he was taken to Nashville for an examination in 1942, the absence of fingerprints or other records in the Federal Bureau of Investigation to corroborate even his claim he had taken an earlier examination in 1942, the complete absence of any records to substantiate his claim of a 1942 license, and his misrepresentations to the Commission, all strongly suggest that his testimony

in the hearing concerning a 1942 examination and license issuance was untrue. While he submitted impressive evidence attesting to his honesty and integrity, this does not dispel or override his proven unreliability as a witness and in his dealings with the Commission with reference to the application for a two-letter call sign. Recognizing the high regard and esteem in which applicant is held by his business associates, his praiseworthy accomplishments both in previous military and government service as well as his industrial career, and evident enthusiastic interest he and his family have evinced by licensed participation in amateur radio, the Examiner is reluctant to find adversely to the applicant under Issue 4. But his testimony in the hearing and his inexcusable conduct vis-a-vis the Commission with regard to the entire two-letter sign affair preclude a determination under Issue 4 that the applicant can be relied upon to operate his station in accordance with the terms of his license and that the Commission can rely upon the representations made in his present application. Furthermore, notwithstanding the favorable factors noted above which point to applicant's apparent reliability and superior competence in his employment in a position requiring integrity and a good reputation, the Examiner also concludes, in light of the evidence adduced pursuant to Issues 1 through 5, that the applicant does not possess the requisite qualifications to be a licensee of the Commission. Accordingly, it is finally concluded that the applications in this proceeding should be denied.

In view of the foregoing, IT IS ORDERED, that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the applications of Herbert L. Rippe for Amateur Radio Station and Extra Class Operator licenses in the Amateur Radio Service ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
ISADORE A. HONIG, *Hearing Examiner.*

F.C.C. 73–1263

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RKO GENERAL, INC. (KHJ–TV), LOS ANGELES, CALIF. For Renewal of Broadcast License	Docket No. 16679 File No. BRCT–58
FIDELITY TELEVISION, INC., NORWALK, CALIF. For Construction Permit for New Television Broadcast Station	Docket No. 16680 File No. BPCT–3655

APPEARANCES

Harold David Cohen, *William S. Green*, and *J. Laurent Scharff*, on behalf of RKO General, Inc.; *Edward P. Morgan*, *Robert N. Green*, and *Walter H. Sweeney*, on behalf of Fidelity Television, Inc.; *Anthony J. Sobczak*, *John F. Reilly*, and *Thomas B. Fitzpatrick*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission; and *Keith I. Clearwaters* and *Peter C. Carstensen* on behalf of the Department of Justice, *amicus curiae*.

DECISION

(Adopted November 30, 1973; Released December 6, 1973)

BY COMMISSIONER ROBERT E. LEE FOR THE COMMISSION:[1] CHAIRMAN BURCH CONCURRING IN THE RESULT; COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING AND ISSUING STATEMENTS; COMMISSIONERS WILEY AND HOOKS NOT PARTICIPATING.

BACKGROUND

1. On August 31, 1965, RKO filed an application for renewal of license covering its station KHJ–TV on Channel 9 in Los Angeles. On October 25, 1965, Fidelity filed an application for a construction permit for a new television station to operate on Channel 9 in Norwalk, California. On June 8, 1966, the Commission issued an order (FCC 66–503) finding both the RKO and Fidelity applications qualified for grant and also finding them mutually exclusive. Hearing was directed on these issues:

1. To determine which of the proposals would better serve the public interest.

[1] Commissioner Reid, who did not hear oral argument, has read the transcript of the oral argument and is participating in this Decision pursuant to Section 1.277(f) of the Rules.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The order carried the following footnote to the designation clause:

"[2] The Commission in its *Policy Statement on Comparative Broadcast Hearings*, (FCC 65–689, released July 28, 1965, 30 F.R. 9660, 5 RR 2d 1901), indicated that it did not therein attempt to deal with '. . . the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.' That remains our position. However, we have also, subsequently indicated (*Seven (7) League Productions, Inc., et al.*, 1 FCC 2d 1597–9) that the Policy Statement will govern the introduction of evidence where a renewal application is being contested. For example, as in regular comparative hearings, evidence relating to programming proposals and to character will not be entertained in the contested renewal proceeding unless first specifically put in issue by the Hearing Order or on subsequent enlargement of issues upon a threshold factual showing that a distinctive difference or deficiency exists and is worth exploring. We have not, however, reached any determinations as to weight to be accorded various factors of difference between the renewal applicant and the competing applicant, preferring instead to do so later upon the full, factual hearing record that is developed by competent evidence under the designated issues. According[ly], parties in a contested renewal proceeding are free to urge any arguments they may deem applicable concerning the relative weight to be afforded the evidence bearing on the various comparative factors developed at hearing."

2. The history of this proceeding until September 9, 1968, is set forth in paragraphs 3–19 of the Initial Decision (FCC 69D–43, released August 13, 1969) of Hearing Examiner Thomas H. Donahue,[2] which paragraphs we adopt and incorporate by reference as fully as if set forth at length herein. Of particular note is the attempt of Fidelity to include, in the issues and the record, material pertaining to a civil anti-trust suit [3] against General Tire and Rubber Company (the corporate parent of RKO General, Inc.), filed March 2, 1967, which dealt generally with the matter of reciprocal dealing allegedly engaged in by General Tire and its subsidiaries. Fidelity, on March 8, 1967, petitioned to enlarge the issues to explore the subject matter of the civil suit. While denying the specific request to enlarge the issues, on June 9, 1967, 8 FCC 2d 632, the Review Board amended the order of designation to include a provision that the outcome of the comparative proceeding in Los Angeles (KHJ–TV) would be "without prejudice to whatever action, if any," the Commission might deem appropriate as a result of the Ohio civil action and held that the relevant facts and circumstances could be adduced by Fidelity under the standard comparative issue. The Hearing Examiner reopened the proceeding on March 11, 1968, to receive evidence on reciprocal dealing which had been developing in the civil antitrust action, "with the caveat that such evidence must be patently germane to RKO's stewardship of KHJ–TV * * *." The Commission later sustained the Board's refusal to add a specific evidentiary issue, FCC 68–892, 14 RR 2d 90, stating that the Examiner's action had afforded Fidelity essentially the relief it sought. However, on its own motion, the Commission added a potential disqualification issue, to wit:

> To determine, in light of the evidence adduced with respect to the preceding issues, whether RKO General, Inc. should be disqualified or, if not, whether a comparative demerit should be assessed against it in this proceeding.

3. On August 13, 1969, the Initial Decision was released in this proceeding. The Hearing Examiner recommended granting Fidelity

---

[2] Now known as Administrative Law Judges. Mr. Donahue retired before the change of nomenclature, and he will be referred to as Hearing Examiner.

[3] *U.S. v. The General Tire and Rubber Company, et al.*, Civil Action No. C–67–155, U.S. D.C., Northern District of Ohio, Eastern Division (erroneously cited in the Initial Decision as 6–67–155).

and denying RKO.[4] Exceptions and a brief were filed by Fidelity on December 12, 1969. Exceptions and a request to file a brief in excess of the page length permitted by Commission rules and the brief were filed and lodged[5] respectively by RKO on December 12, 1969. Reply briefs were filed June 5, 1970, by both Fidelity and RKO, and an erratum was filed by RKO on June 23, 1970. The Department of Justice lodged a brief, *amicus curiae*, on June 10, 1970, pertinent to the qualifications of RKO only insofar as they might be affected by the "reciprocal dealings" matter, together with a corrected page submitted June 11, 1970; a reply brief was filed by RKO on July 20, 1970; and a memorandum in response was filed by the Department of Justice on August 10, 1970.[6]

4. Meanwhile, on December 3, 1969, the Commission designated the renewal application of RKO General, Inc. for Channel 7, Boston, Massachusetts (WNAC–TV), for hearing with two competing applications.[7] The issues included, *inter alia:*

> 3. To determine with respect to the application of RKO General, Inc., whether in view of the evidence concerning alleged anticompetitive practices by RKO General, Inc., or its parent corporation, General Tire and Rubber Co., RKO General, Inc., should be disqualified to remain a licensee of the Commission or if not so disqualified, whether a comparative demerit should be assessed against it in this [Boston] proceeding.

The order provided that official notice might be taken of the record in the Los Angeles KHJ–TV proceeding and that only new or additional evidence not adduced in this proceeding might be adduced in the Boston proceeding. It also included provisions that, in the event of a grant for WNAC–TV, the grant would be subject to whatever action the Commission deemed appropriate as a result of the pending civil antitrust suit and the developments and findings in the proceeding before the Commission involving the renewal of KHJ–TV's license.

5. The antitrust action in the United States District Court was, however, terminated on October 22, 1970, by a consent judgment. Consequently, the Commission does not have the benefit of any findings therefrom, and the reservation by the Commission of the right to predicate action in the RKO renewal proceedings on the outcome of the civil suit has become a nullity. Thereafter, on September 10, 1971, Fidelity petitioned the Commission to take official notice of the consent judgment. The Commission did so,[8] noting that, while this matter had previously been subject to any action the Commission might deem appropriate as a result of a final adjudication in the civil suit, this proviso no longer obtained and that the resolution of this case would be based on the record developed in the proceedings before the Commission.

---

[4] Except as modified herein and by the rulings on exemptions which are attached as an appendix, the findings of fact set forth by the Examiner in his Initial Decision are adopted. However, since we do not agree with his ultimate determination, the conclusions set forth herein will be substituted for those of the Examiner.

[5] The brief of excess page length was accepted for filing by the Commission's Memorandum Opinion and Order, 31 FCC 2d 70 (1971).

[6] The brief, *amicus curiae*, and the pleadings responsive thereto were also accepted for filing, *ibid.*

[7] 20 FCC 2d 846 (1969).

[8] FCC 71–970, released September 20, 1971.

6. During the same period, the Broadcast Bureau also sought to reopen the KHJ–TV record for the introduction of additional evidence. It alleged that there was then available considerably more evidence bearing on the anticompetitive activities of General Tire, RKO General, Inc., and their subsidiaries and affiliates than was available when the anticompetitive phase of the Los Angeles hearing was in progress. While the Broadcast Bureau indicated a preference for reopening the Los Angeles record with an issue identical to that in the Boston proceeding, it suggested, as a possible alternative, that the outcome of the Los Angeles proceeding could be made dependent upon the final result of the anticompetitive issue in the Boston proceeding in a manner similar to that in which the ultimate result of the civil antitrust suit might have been used. The Broadcast Bureau's petition further referred to another petition pending before the Review Board to add issues in the Boston proceeding to determine whether certain officers, employees and former employees of General Tire and RKO had misrepresented or concealed facts, or been lacking in candor in their testimony concerning reciprocal trade practices when testifying in the Los Angeles proceeding and, if so, whether RKO should be disqualified as a licensee in Boston or assessed a comparative demerit. The Bureau requested that the Commission either direct the Review Board to add such issues to the Los Angeles proceeding or add them itself.

7. In the interval after the Bureau's filing, the Review Board acted upon the pleadings before it and added the following issues to the Boston proceeding: [9]

> (a) To determine whether in sworn testimony given in the course of the KHJ–TV proceeding, Docket Nos. 16679–16680, officers, employees, and/or former employees of General Tire and Rubber Company, or of RKO General, Inc., misrepresented facts, concealed facts, or were lacking in candor with regard to the existence, nature, and extent of reciprocal trade practices engaged in by General Tire and Rubber Company and RKO General, Inc.; and
>
> (b) To determine in light of the evidence adduced pursuant to the aforementioned issue whether RKO General, Inc. should be disqualified as licensee of WNAC–TV or, alternatively, assessed a comparative demerit.

After consideration of all of the circumstances, the Commission concluded [10] that no useful purpose would be served by reopening the record in this proceeding. Rather, the Commission modified the second issue added by the Board, *supra*, in the Boston proceeding to determine whether RKO should be disqualified as a licensee, made Fidelity a party to the Boston proceeding insofar as the issues therein pertained to RKO's licensee qualification, and stated that, in the event RKO was found on a comparative basis to be the preferable applicant herein, the issuance of a final decision would be deferred until the conclusion of the Boston proceeding when such action as then appeared appropriate would be taken. Oral argument was scheduled and held before the Commission, *en banc*, on October 12, 1971.

---

[9] 30 FCC 2d 138 (1971).
[10] 31 FCC 2d 70 (1971), paras. 8 and 17.

8. On June 11, 1973, the United States Court of Appeals for the District of Columbia Circuit issued an Order [11] reciting that Fidelity Television, Inc. had petitioned the court for a writ of mandamus to compel the Commission to issue a decision in this proceeding. The Court, while declining to issue such a writ, stated that the Commission's decision appeared to have been unreasonably delayed, that the Commission would likely act in accordance with the views expressed without issuance of a writ, and that a report of the Commission's action should be filed with the Court within thirty days. On July 2, 1973, the Commission held a special meeting and determined that a decision herein would be prepared as expeditiously as possible. This action was duly reported to the Court on July 6, 1973.

PRELIMINARY MATTERS

9. On August 16, 1971, RKO filed a petition to dismiss Fidelity's application or, alternatively, to enlarge the issues and reopen the record for further hearing.[12] RKO's petition is founded upon a petition for leave to amend which Fidelity filed on August 5, 1971, and which was granted by the Commission's Memorandum Opinion and Order, 31 FCC 2d 919 (1971). In substance, RKO asserts that Fidelity's amendment reflects a fundamental change in its corporate structure which had been in effect for at least 17 months and that Fidelity had thus been in gross dereliction of its duty to inform the Commission within 30 days of any substantial and significant changes involving its application, as required by Section 1.65 of the Commission's Rules. Subsequently, RKO filed a motion to supplement its petition against Fidelity,[13] urging that, in a petition for leave to amend filed by Fidelity on April 6, 1973, Fidelity finally informed the Commission of the acquisition by one of its stockholders of certain newspaper interests in May, 1972.

10. Without further discussion of the parties' extensive pleadings, we are convinced that Fidelity's failure to report changes in its corporate structure and acquisition of newspaper interests by one of its stockholders within the 30-day period provided by Section 1.65 raises very serious questions. Since our disposition of a case of this nature is based on the record compiled by the parties, all applicants have a continuing obligation to report any changes bearing on their comparative qualifications, and any failure to do so reflects adversely upon that applicant. Here, based on Fidelity's repeated inability to keep the Commission informed of the changes concerning its proposal, we would ordinarily enlarge the issues and remand for a further hearing to determine all of the facts surrounding these incidents and their impact upon both the basic and comparative qualifications of Fidelity before considering a

[11] Case No. 73–1313.

[12] RKO filed a supplement to its petition on August 23, 1971; Fidelity filed an opposition on August 26, 1971, which was supplemented by a letter filed November 4, 1971; the Chief, Broadcast Bureau, filed comments on August 31, 1971; RKO filed a reply on September 8, 1971; Fidelity filed a supplement to its opposition on September 13, 1971; and RKO filed both a motion for leave to file a response and a response to Fidelity's supplement on September 21, 1971. In view of the disposition of RKO's underlying petition, its request for leave to file a response will be dismissed as moot.

[13] RKO's supplement was filed on April 25, 1973; Fidelity filed an opposition on May 7, 1973; and the Chief, Broadcast Bureau, filed comments on May 8, 1973.

grant of its application. *Cf. Folkways Broadcasting Co., Inc.*, 26 FCC 2d 175 (Rev. Bd. 1970).

11. However, it now appears that any further delay in the resolution of this case would be inappropriate. Thus, while we might have preferred to base our Decision on a more complete record in an ordinary case, we believe the circumstances here require us to go forward on the present record. When this fact is considered in the light of the ultimate conclusions to be drawn from the existing record, we are convinced that no useful purpose would be served by any further consideration of the Section 1.65 questions and that RKO's pleadings should be dismissed as moot. In order for the record to reflect the facts as they actually exist, however, we shall grant the petition for leave to amend filed by Fidelity on April 6, 1973.

12. On November 16, 1971, Fidelity filed a request for official notice.[14] urging the Commission, without reopening the record, to take account of the facts that an RKO subsidiary was granted a CATV system franchise for Inglewood, California, which is within the predicted Grade B contour of KHJ–TV. In response, RKO points out that the CATV system never became operational and that it has been assigned to a third party. Subsequently, RKO filed a petition for leave to amend on December 14, 1972, to provide a current compilation of its media interests, including CATV properties.[15] As we stated in *TV Signal Company of Aberdeen*, 23 FCC 2d 603 (1970), renewal applicants should report their interests in both operating and nonoperating CATV systems. Thus, we shall grant RKO's petition for leave to amend and Fidelity's request for official notice so that the record will reflect the relevant facts as accurately as possible.[16]

TRADE PRACTICES INVOLVING KHJ–TV

13. This matter originally arose out of the civil action filed by the Department of Justice against General Tire and three of its subsidiaries, including RKO, alleging that they had violated the Sherman Antitrust Act by conspiring to force their suppliers to purchase products and services from them. However, that action was ultimately terminated by the issuance of a consent decree which precludes General Tire and its subsidiaries from taking certain actions in the future without finding that they had engaged in such conduct at any time in

[14] In connection with this request, Fidelity filed a letter on October 19, 1971; RKO filed a letter in response on November 1, 1971; RKO filed an opposition to the request for official notice on December 1, 1971; Fidelity filed both a request to file additional pleading and a reply on December 6, 1971; RKO filed an opposition to Fidelity's request to file additional pleading; and Fidelity filed a supplement to its request for official notice on January 19, 1972. We shall grant Fidelity's request to file an additional pleading so that the record will fully reflect its position on this question.

[15] In an opposition filed December 22, 1972, Fidelity objects that RKO may have improperly delayed in reporting its CATV interests. However, Fidelity, providing no factual support for its contention, relies on mere speculation which requires no further consideration at this time.

[16] Other petitions for leave to amend were filed by Fidelity on July 18, 1972; and by RKO on January 27, March 9, June 23, July 7, July 17, and September 5, 1972, and on February 8, March 15, April 19, May 1, May 10, June 29 July 30, September 4, September 21, and November 14, 1973. Fidelity filed comments on RKO's March 9, 1972 petition, urging that the proposed amendment should not be allowed to improve RKO's status in this proceeding. Since no applicant in a comparative hearing is allowed to gain a comparative advantage by relying upon an amendment submitted after the hearing has begun, see *Flower City Television Corp.*, 4 FCC 2d 384 (1966), and since the record should fully reflect the actual facts, we shall grant all of the petitions listed above.

the past. In spite of this circumstance, evidence bearing on the question was adduced during the course of this proceeding. As noted above, the impact of this and other evidence on RKO's general licensee qualifications is at issue in the Boston, WNAC–TV renewal proceeding which is not yet before us, and, thus, our present consideration will be limited solely to those matters involving RKO's operation of KHJ–TV.[17]

14. During the early 1960's, both General Tire and RKO established employee positions to carry out trade relations activities to improve customer and supplier relationships. The functions of these positions included seeking new markets and customers for their products and new sources of supply for goods which they purchased, gathering and analyzing information of commercial and trade developments, and facilitating intercorporate communications. On occasion, these employees also contacted counterpart personnel of other companies to provide an entry for their own salesmen or to obtain review of an earlier refusal to do business, which might lead to institution of or an increase in the companies' mutual patronage. Because each party to such an arrangement is both a supplier and a purchaser of goods or services, it is often described as a reciprocal trade practice or reciprocal dealing, without regard to the nature of the factors which prompted the parties to enter into the agreement.

15. While it has clearly been established that mutual patronage resulting from either coercion or threats of reprisal is an unfair trade practice,[18] neither the Department of Justice nor the Broadcast Bureau [19] claims that such conduct occurred here, and, on the basis of our own review of this record, we are convinced that there is no significant evidence establishing that KHJ–TV either engaged in or was the beneficiary of any unfair trade practice of that sort. On the other hand, we do recognize that KHJ–TV was involved in a number of mutual patronage situations during this period, as would be normal for any separate entity of a large conglomerate such as General Tire. Thus, the question here is not whether reciprocal dealing was practiced with respect to KHJ–TV,[20] but whether this conduct should reflect adversely upon the operation of the station.

16. For the reasons set forth below, we do not believe that such a conclusion is warranted in this case. As the Review Board previously noted, 8 FCC 2d 632 (1967), note 4, the civil suit against General Tire and RKO was the first case to raise the question of whether reciprocal dealing, standing alone, violates the antitrust laws. Since that suit was ultimately dismissed without any determination that improprieties had occurred, the legal questions therein were never resolved. In view of the circumstances that the relevant legal and economic concepts

[17] While we would have preferred and had intended to wait for the completion of the Boston proceeding before acting on KHJ–TV's renewal so that all of the questions about RKO's qualifications could be resolved at one time, we believe, for the reasons stated in paragraph 11, above, that this proceeding must now be decided without further delay.

[18] See, for example, *Waugh Equipment Company*, 15 FTC 232 (1931).

[19] Broadcast Bureau's proposed findings of fact and conclusions of law on reopened record, filed on January 31, 1969.

[20] Although a distinction can be drawn between mutual patronage which results from genuine, independent determinations that the other party offers the "best buy" and that which results from a voluntary agreement of the parties to do business with each other without regard to the advantages offered by other suppliers, we are not persuaded that the evidence in the present record is adequate to determine the intent of the parties as to the limited amount of KHJ–TV's advertising in question.

104–019—74——9

were in a state of flux at the time covered by this record, that neither responsible officials nor the courts had given any clear explanation of the applicability of the broadly drawn statutes, and that there was accordingly no certainty that trade relations practices were improper, we find no present basis for charging RKO with knowing and willful misconduct.

17. In this connection, while we do not wish to suggest that evidence hereafter of reciprocal dealing intended to gain an anticompetitive advantage would be condoned or excused, it is important to note that many other corporations engaged in similar trade relations practices during this period and that the Department of Justice terminated its civil antitrust suit on the basis of injunctive provisions which are essentially prospective in nature. When these facts are considered in the light of RKO's unblemished record as a broadcaster covering more than 25 years, we are not persuaded that the record in this case is sufficient to raise any meaningful question about RKO's willingness and ability to act in a responsible manner in performing its obligations as a licensee in the future. Thus, we are convinced that there is no reason, on the limited record of the trade relations practices involving KHJ–TV now before us,[21] either to disqualify RKO as the licensee of KHJ–TV or to assess a comparative demerit against its proposal in this proceeding.

KHJ–TV'S PAST BROADCAST RECORD

18. In the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, the Commission stated that no preference would be given for a past broadcast record within the bounds of average performance, since average future performance is expected of all licensees. The Commission also noted that an unusually good record could be shown by special attention for the public's needs and interests reflected by changing programming to meet the area's evolving needs, but that an unusually poor record may be established where there has been a failure to meet the public's needs and interests. Thereafter, the Court of Appeals held in *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201, 22 RR 2d 2001 (1971), that incumbent licensees should be judged primarily on their records of past performance, that insubstantial past performance should preclude renewal of a license, but that superior performance should be a plus of major significance in renewal proceedings.

19. In this proceeding, KHJ–TV operates without a network affiliation in a market with seven commercial VHF television stations. Analysis of KHJ–TV's composite week for the license period, December 1, 1962, to November 30, 1965, shows that the station carried 86.5% entertainment programming; 3.375% news; 3.75% educational; 3% talks; 3.375% religious, agricultural, and discussion; and 7.13% live programming, with 5% in prime time,[22] and that it broadcast 1,132

[21] In our view, the mutual patronage advertising carried on KHJ–TV was not sufficient, in any event, to fall within the "not insubstantial amount" of affected commerce test as discussed in *United States* v. *General Dynamics Corporation*, 258 F. Supp. 36, 66 (1966).

[22] In comparison with the three other independent, VHF television stations in the market, KHJ–TV during this period had the highest percentage of entertainment programming, the lowest percentages in the news and discussion categories, and the lowest percentages of live programming, for both the total day and prime time.

commercial spot announcements, averaging slightly more than 8 per hour.

20. The record in this proceeding establishes that RKO was the first licensee to use a motion picture studio's film library as a regular source of entertainment programming on a daily basis, that KHJ–TV pioneered in the implementation of this innovation in its market, and that the presentation of these feature films on a continuing basis fulfilled a genuine need in the Los Angeles area during the license period. Among the fims carried by KHJ–TV in response to this need were a series of Spanish language movies, several operas, and a variety of highly acclaimed motion pictures. The station also carried a number of plays produced by the British Broadcasting Corporation, a series called "Play of the Week," and several other cultural programs. In addition, KHJ–TV produced and broadcast programs involving Hollywood Bowl concerts, the Los Angeles Symphony Orchestra, the Los Angeles Art Museum, the UCLA Art Center, and other artistic presentations. Other programs were devoted to popular music and personalities, local parade highlights, beauty pageants, and similar events.

21. In this connection, KHJ–TV has received various awards and commendations for its programming during the license period from the Hollywood Chapter of the Academy of Television Arts and Sciences, the National Association for Better Broadcasting, the Los Angeles City Council, and other groups and community leaders. A number of individuals also expressed favorable comments about the operation of the station. However, among the many films presented by KHJ–TV,[23] the movies, "Jack the Ripper," "Pretty Boy Floyd" and "House of Wax," were shown numerous times during children's viewing hours in July and September, 1964. Each of these films included scenes of crime and violence, generating a series of public complaints by the National Association for Better Radio and Television, the Los Angeles Council of United Church Women, Congressman Lionel Van Deerlin, and several other persons.

22. Turning to the other aspects of KHJ–TV's performance, its record of public affairs programming included a series of programs on selected Greater Los Angeles cities with problems common to much or all of the area, on the scene reports and interviews from ten Western Hemisphere nations, a regular weekday discussion program presented in mid-afternoon and edited for repetition in prime time, and a wide range of documentaries and public service programs produced by other stations. A series of taped educational programs produced by local educators was also broadcast five days a week at 11:30 a.m. and sometimes repeated late at night. KHJ–TV's agricultural programming, however, consisted of a 30-minute film produced by the Department of Agriculture, which was shown on Saturday mornings. The religious programming included a number of filmed programs and short taped inspirational messages which were presented at the beginning and end of each broadcast day. A large portion of KHJ–

[23] Various syndicated programs and 48 feature films took up 113 hours and 41 minutes of the 133 hours and 40 minutes of the station's programming during the composite week. For the entire license period, a total of 1,454 movies, not including ones listed as "to be announced" or Spanish films shown on Saturdays, were carried at least 6,534 times. Of those movies, 66 were shown from 12 to 21 times.

TV's talk programs was devoted to interviews in conjunction with its feature films and sports events.

23. The station also has a well equipped newsroom and mobile facilities which have been used in its coverage of news conferences and governmental meetings, and KHJ–TV has availed itself of the service from the Washington News Bureau operated by RKO, which is one of the few licensees—aside from the national networks—to maintain such a national news office.[24] The station has preempted its regular programming to provide live coverage of both local and national emergency situations, and it initiated television coverage of many sports events in the Los Angeles area. Finally, it should be noted that the programming discussed above was reported without any significant inaccuracy, that KHJ–TV's performance during the license period was entirely consistent with the representations made in its 1962 renewal application as to categories, amounts, and kinds of programming and the number of commercial announcements, and that the promises made in 1962 were deemed sufficient at that time to satisfy the public interest requirement of the Communications Act.

24. In assessing KHJ–TV's past broadcast record, we are initially convinced that it would be neither proper nor feasible for us to attempt to evaluate the quality of individual programs. The function of the Federal Communications Commission is not to sit as a critic or censor dictating what viewers across the country see, but rather to encourage licensees to ascertain the needs and interests of their audiences and to offer those audiences an opportunity to enjoy a broad variety of programming, with the market place serving as the final arbiter as to the value of a specific broadcast. By the same token, since every program will not be received with the same degree of approval by the public, we recognize that it is not uncommon for licensees to receive complaints from time to time. Indeed, it is clear that this is the unavoidable result of the freedom given to licensees to present programming recognizing the many different tastes of their audiences, and thus the mere fact that complaints have been filed is not necessarily significant.

25. This is not to say, however, that evidence of public dissatisfaction can be ignored. If a licensee continually disregards a significant trend of public opinion expressed over a substantial period of time and a growing number of viewers raise substantial objections to a licensee's programming practices without any change resulting from the reaction in the market place, we would of course be concerned about the licensee's failure to be responsive to his audience's expressed needs and interests. But where the licensee has made a good faith effort to satisfy various segments of the public, we are not persuaded that significant weight should be placed on the fact that not all members of the public were equally pleased with every program broadcast by the licensee.[25] To hold otherwise, we are convinced, could only generate

[24] KHJ–TV's news programming, which varied in length and frequency from time to time during the license period and which did not include any editorial commentary, generally consisted of one minute capsules in the morning and early afternoon, a five minute newscast in midafternoon, a fifteen minute newscast in the evening, and about fifteen minutes of news late at night.

[25] In this connection, Fidelity's efforts to find fault with KHJ's programming must also be considered and evaluated in the perspective of the facts that an incumbent licensee is always subject to criticism and that its weak points, no matter how insignificant, will be highlighted by a challenger in this type of proceeding.

pressures upon licensees, contrary to the public interest, to present a bland, uniform type of programming which would be inoffensive to all, but neither stimulating nor fulfilling for any. Indeed, in our view, such a development, diminishing rather than enhancing the freedom of our society, would be a tragic result.

26. In this case, although the record contains evidence of dissatisfaction, concerning KHJ–TV's feature film programming practices, there were also significant expressions of support for its policies from the public, and thus we do not believe that there is any present basis for drawing a conclusion adverse to KHJ–TV in this respect. As for the other aspects of its record, while we recognize that there are some aspects of its performance which may not warrant favorable consideration, the station should be given credit for its locally produced cultural and artistic programs and other entertainment specials which were broadcast in prime time. Furthermore, it must be noted that KHJ–TV's commercial policies conformed with the Television Code of the National Association of Broadcasters and that its actual broadcast performance met or exceeded in all respects the promises which it made in its 1962 renewal application. In this connection, it must also be remembered that KHJ–TV is not affiliated with any television network, that the station is competing in a market with six other commercial VHF facilities, and that its programming was supported by a significant segment of the public. Under these circumstances, we are persuaded that there are sufficient good points to offset the less favorable aspects of KHJ–TV's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, thus warranting neither a preference nor a demerit.

DIVERSIFICATION

27. The record to be considered in making the comparison under this criterion reflects that RKO, in addition to KHJ–TV, owns and operates AM and FM broadcast stations in Los Angeles and AM, FM, and TV stations in other cities across the country and that it has interests in numerous CATV systems and other media related enterprises in various parts of the nation. Although neither Fidelity nor its stockholders has any interest in an existing broadcast facility, one stockholder does have a 10% interest in a CATV system, and another stockholder has a 26% interest in a corporation publishing newspapers in several suburbs in the Los Angeles area.[26] Within KHJ–TV's Grade B contour, there are two daily newspapers of general circulation, 69 other daily newspapers, and 281 newspapers published one or more times each week; a total of 15 commercial television stations have been assigned to the Los Angeles market; and there are 62 AM and 64 FM stations serving areas within or near KHJ–TV's Grade B contour.

28. In addition to these matters, we believe that consideration must also be given to the facts that there is no evidence in this proceeding of any attempt by RKO to influence the operation of KHJ–TV in such a way as to promote any national or other uniform expression of po-

[26] See paragraphs 9–11, above.

litical, economic, or social opinion; that there has been no pattern in the public affairs programming of RKO's stations which would justify the assessment of any kind of a demerit; and, indeed, that KHJ–TV's access to RKO's Washington News Bureau and public affairs programming has actually increased the sources of information available to Los Angeles viewers. Thus, although RKO clearly has more media interests than Fidelity, we are not persuaded that the nature of RKO's interests is such as to have any adverse effect on the flow of information for the audience to be served here.

29. At the same time, while the full impact of Fidelity's recently acquired newspaper interest on this proceeding could not be finally determined without a further hearing, it is now apparent that Fidelity is no longer free of any connection with the publication of local newspapers and that this development diminishes to some extent the attractiveness of its proposal in this comparative analysis. Finally, it must be noted that there is a plethora of outlets for diverse and antagonistic views already in existence in this area, that RKO's ownership of KHJ–TV has been in compliance with the Commission's regulations and consistent with the public interest at all times since the station was acquired, and that the renewal of the license will not increase the concentration of media ownership in any way. In this connection, we also believe, as we have noted previously, that any attempt to restructure ownership patterns in the broadcast industry should be done by rule making, with general applicability, protection of all parties, and appropriate arrangements for divestment, rather than by an *ad hoc* interpretation of the diversification, or any other, criterion in a comparative renewal proceeding. See *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 31 FCC 2d 443 (1971). Under these circumstances, we are convinced that neither applicant has made a sufficient showing to warrant the award of any preference under the diversification criterion. *Cf.*, *Farragut Television Corporation*, 8 FCC 2d 279 (1967).

PARTICIPATION IN STATION OPERATION

30. Fidelity proposes that William G. Simon, President, General Manager and 20.6% stockholder, and Nello C. Di Corpo, Director of Public Service Programming and 2.06% stockholder, will devote full time to the operation of its planned television station.[27] Simon has lived in the Los Angeles area since 1960, and Di Corpo has resided in that area all of his life. Both men have been active in local civic activities, but neither has any significant amount of broadcast experience. While Simon, who began the practice of law after his retirement from the FBI in 1964, will, as General Manager, oversee the operations of the station, a professional broadcaster, serving as the station manager, will be responsible for the daily activities at the station. Other professionals

[27] Although Fidelity asserts that other stockholders will spend varying amounts of time, ranging from five to twenty hours a week, on station activities, the *1965 Policy Statement* clearly holds that no credit will be given for the participation of any person who will not devote substantial amounts of time on a daily basis to the station. 1 FCC 2d at 395. Since Fidelity has made no showing that any of these other stockholders would participate on a daily basis, further consideration of their participation is not required.

will be hired to fill the day-to-day positions of program manager, sales manager, news director and chief engineer. Di Corpo's efforts as Director of Public Service Programming will be under the supervision of the professional program manager.

31. Although Fidelity has no record of previous operation to be considered in making a qualitative evaluation of its proposal, it has, in the prosecution of its application before this Commission, engaged in certain activities which may give some indication of its future behavior if it were to become a licensee. In this connection, on December 24, 1969, the Broadcast Bureau filed a petition questioning the preparation, signing, and filing by Fidelity of stock subscription agreements, amendments of its application, and affidavits. While the Bureau's petition was denied on April 22, 1970, the Commission stated, 22 FCC 2d 737, at 740:

> . . . that Fidelity was remiss in its representations to the Commission in failing to indicate that purported signatures were actually signed by agents, failing to secure ratification of so-signed documents without delay or withdrawing them, and otherwise failing to keep its house in order, . . .

thus clearly putting Fidelity on notice that its efforts to carry out its responsibilities as an applicant had been inadequate.

32. Nevertheless, on August 5, 1971, Fidelity filed a petition for leave to amend, reflecting significant changes in its corporate structure, without in any way suggesting that they had been in effect for at least 17 months. When challenged by RKO, see paragraph 9, above, Fidelity offered no excuse whatsoever for having filed its petition as if it were reporting contemporaneous events, simply asserting that the changes were not thought to be significant enough to require reporting, in spite of the fact that it had previously filed amendments reflecting similar changes.[28] Thereafter, on April 6, 1973, Fidelity filed another petition for leave to amend, this time reporting that one of its stockholders had acquired certain newspaper interests nearly one year earlier and claiming that it would not have any significance in the disposition of this proceeding, despite the paramount importance attributed to the diversification criterion under the *1965 Policy Statement* and despite its previous assertion of a preference based on the absence of any such connection.[29]

33. While a single failure to report a change in an application might not necessarily be of decisional significance, it is clear that every applicant has a continuing obligation to disclose to the Commission all pertinent facts and circumstances concerning the prosecution of its proposal. Thus, where there is a repeated failure to make timely and necessary reports of new developments affecting a proposal, a serious

[28] Although Fidelity's counsel subsequently attempted to assume responsibility for the delay in reporting the changes in Fidelity's proposal, there is no escaping the fact that Fidelity's earlier pleadings did not provide an open and candid explanation of the circumstances. In this respect, it should also be noted that one of Fidelity's stockholders, Louis J. Cella, Jr., testified during the hearing in a manner which, at the very least, must be described as evasive when questioned about the circumstances which resulted in the termination of his role as Vice President and Director of the applicant. See Transcript pages 1684–1695.

[29] Fidelity's inability or unwillingness to report developments in its proposal continues even to the present time. Thus, even though RKO, in a pleading filed September 8, 1971, pointed out significant changes in the percentages of stock held by each of Fidelity's stockholders, Fidelity has not made any attempt to submit the correct information in the form of an amendment to its application.

question arises as to whether the applicant comprehends the duties of a licensee and whether it can be expected to assume and discharge the responsibilities connected with the implementation of its proposal. Since it appears that Fidelity has on several occasions neglected to report such changes in a timely and open manner, and particularly since this practice continued even after its attention was directed to the need to keep its house in order, we believe that the record here gives little promise that Fidelity will effectively implement its paper integration promises and that this circumstance significantly reduces the weight which can be accorded to its quantitative integration proposal.

34. Turning to KHJ–TV, none of its management personnel has any significant ownership interest in the licensee. RKO has, however, within the supervisory policies and practices established for all of its stations, afforded considerable autonomy to the local staff in the operation of KHJ–TV. At the same time, RKO requires the management of its stations to involve themselves in a wide range of community and civic organizations and to use the information gained from such contacts to help determine the direction and programming of the station. During RKO's operation of KHJ–TV since 1951, station personnel living in the Los Angeles area have participated in community activities and acquired broad knowledge of local needs. In this way, the operation of KHJ–TV has combined the experience and stability of RKO's national organization with the independence and sensitivity to community needs of its local management to serve the entire area.[30]

35. While Fidelity enjoys an obvious quantitative advantage, it is important to note in evaluating the proposals in this comparative renewal proceeding that we are necessarily comparing an untested promise of future performance with a record of actual experience based on continuing contacts with the community, and, thus, Fidelity's proposal must be considered with care to determine whether any preference is realistically warranted. In this connection, the record shows that Fidelity will rely in many respects on a professional staff similar to that employed by RKO, that Fidelity's principals lack the broadcast experience which KHJ–TV's management has acquired in the operation of the station, and that RKO gives the station's staff autonomy to use their familiarity with the area's needs to develop appropriate programming. When these factors are considered in the light of Fidelity's demonstrated inability or unwillingness to carry out its responsibilities as an applicant, it is clear that Fidelity's quantitative advantage has been neutralized by the qualitative characteristics of its proposal and that, on balance, the differences in these two proposals are not so significant as to warrant a preference for either applicant under the integration criterion.

OTHER FACTORS

36. From our consideration of these proposals up to this point, we have established that each applicant is basically qualified to be a

[30] In contrast to KHJ–TV's areawide service, it should be noted that Fidelity proposes to emphasize the needs and interests of a portion of the entire area in its programming, to the detriment of the public in the remaining areas. *Cf., Petersburg Television Corp.*, 19 FCC 451, at 474–476 (1954).

licensee, that the characteristics of the proposals differ in certain respects, but that none of those differences provides a basis for making a choice between the two applicants in this proceeding. Nonetheless, a selection must be made, and so we shall look to other aspects of the record affecting the public interest. In this connection, we believe that recognition must be given to the rights and expectancies of an ordinary renewal applicant. As stated by the Court in *Greater Boston Television Corporation* v. *F.C.C.*, 143 U.S. App. D.C. 383, at 400, 444 F. 2d 841, at 858, 20 RR 2d 2052, at 2073–2074 (1970), ". . . such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security."

37. Here, RKO's financial stability has provided an experienced and competent staff for KHJ–TV and afforded the station an opportunity to develop and strengthen its programming and community involvement in spite of financial losses. Since the station was acquired in 1951, RKO's investment of money and other resources has successfully made KHJ–TV a viable operation in a highly competitive market. Under these circumstances, and in keeping with the views expressed in *Greater Boston*, *supra*, we believe that there is a public interest, both in the Los Angeles area and the nation at large, in insuring the predictability and stability of broadcast service. If there is no such security for applicants seeking facilities with the intention of providing good service for the public, the overall development and motivation of the industry will suffer. While we recognize the need to avoid any burden upon an applicant for a new facility seeking to show that it will better serve the public interest, we are persuaded that credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of the existing service.[31] Since Fidelity has had a full opportunity to demonstrate that its proposal will better serve the public interest, and since the record is clear that Fidelity has not demonstrated that it will in fact provide a better service than RKO, we are convinced, for the reasons set forth above, that RKO's renewal application for KHJ–TV must be preferred.

38. However, the Commission's Memorandum Opinion and Order, 31 FCC 2d 70, released in this proceeding on August 2, 1971, stated that, in the event KHJ–TV is the preferable applicant on a comparative basis, final action would be held in abeyance pending the conclusion of the adjudicatory proceeding involving WNAC–TV Boston, Docket No. 18759, and that thereafter such action would be taken as appears to be necessary and appropriate in light of the evidence introduced in, and the outcome of, the Boston proceeding concerning the qualifications of RKO to be or to continue to be a licensee. Inasmuch as the questions

[31] The Commission has already indicated that the holding of *WHDH, Inc.*, which involved an existing operation conducted under various temporary authorizations and where a determination had been made that new applications would be accepted upon the expiration of the licensee's four month license, was restricted to the facts of that proceeding and that it does not apply to the situation of a conventional applicant for renewal of license. 17 FCC 2d 856, at 872–873 (1969). Nonetheless, since earlier language in the Commission's Decision in that proceeding, 16 FCC 2d 1 (1969), has been construed by some commentators to place an insuperable burden on a renewal applicant in a proceeding such as this one, we wish to take this opportunity to emphasize that such is not our intention and that the renewal applicant's ability to continue an existing service without disruption will be given weight in the future on a record like this one.

bearing on RKO's qualifications in the Boston proceeding have not yet been resolved, we shall, consistent with views expressed above, condition our present action in this case on the outcome of the Boston proceeding.

39. Accordingly, IT IS ORDERED:

(a) That the RKO General, Inc. petition to dismiss application of Fidelity Television, Inc., or, alternatively, to enlarge issues and reopen record for further hearing, filed August 16, 1971; the motion of RKO General, Inc. for leave to file response to supplement of Fidelity Television, Inc., filed on September 21, 1971; and the motion of RKO General, Inc. to supplement petition against Fidelity Television, Inc., filed April 25, 1973, ARE DISMISSED as moot.

(b) That the request for official notice filed by Fidelity Television, Inc. on November 16, 1971, and the request to file additional pleading filed by Fidelity Television, Inc. on December 6, 1971, ARE GRANTED.

(c) That the petitions for leave to amend filed by Fidelity Television, Inc. on July 18, 1972, and April 6, 1973; and by RKO General, Inc. on January 27, March 9, May 9, June 23, July 7, July 17, September 5, and December 14, 1972, and on February 8, March 15, April 19, May 1, May 10, June 29, July 30, September 4, September 21, and November 14, 1973, ARE GRANTED and the respective amendments ARE ACCEPTED.

(d) That the application of RKO General, Inc. for renewal of license for station KHJ–TV, Los Angeles, California, File No. BRCT–58, IS DEEMED TO BE GRANTED, and that the application of Fidelity Television, Inc. for a new television broadcast station at Norwalk, California, File No. BPCT–3655 IS DEEMED TO BE DENIED, subject to whatever action may be deemed appropriate following resolution of the matters in Docket No. 18759.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, *Secretary.*

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

EXCEPTIONS OF RKO GENERAL, INC.

Exception No.	*Rulings*
1, 2, 4, 6–14, 16–31, 33–43, 59, 61–69, 71, 73, 75–80, 82, 85–89, 92, 93, 101–105, 107–112, 114, 115, 117, 120, 122, 124, 127–136, 140–151.	Denied. The Examiner's findings adequately and correctly reflect the record.

Exception No.	*Ruling*
3, 5	Granted to the extent that the record reflects RKO's media holdings as shown in its more recent amendments.
15	Denied for lack of decisional significance. See *RKO General Inc. (WNAC–TV)*, 35 FCC 2d 100 (1972).
32	Granted to the extent that the words "by the same organization" are deleted, and *denied* in all other respects since the Examiner's findings correctly reflect the record.
44–58, 70, 72, 81, 84.	Denied. The Examiner's rulings contain no significant error.
60	Denied for lack of decisional significance. See footnote 27 of our Decision herein.
74	Granted to the extent reflected in footnote 30 of our Decision herein.
83	Granted to the extent reflected in footnote 28 of our Decision herein, and *denied* in all other respects for lack of decisional significance.
90, 91	Granted in substance. See paragraph 27 of our Decision herein.
94–96, 98, 100, 106, 113, 116, 118, 119, 121, 123, 125, 126, 137–139, 152, 153.	Denied. The Examiner's findings contain no significant error.
97	Granted in substance. See paragraph 14 of our Decision herein.
99	Granted in substance. See paragraph 17 of our Decision herein.
154, 156, 158, 166, 168, 175, 178.	Granted to the extent reflected in our Decision herein.
155	Denied. Matters pertaining to proposed programming are not considered in the absence of a special issue. See *1965 Policy Statement*, 1 FCC 2d at 397–398.
157	Denied for lack of decisional significance.
159	Granted to the extent reflected in our Decision herein and otherwise *denied* for the reasons set forth in paragraphs 24–26 of our Decision herein.
160–165, 167, 169, 171–174, 176, 180, 181, 170, 179	Granted to the extent that our conclusions have been substituted for those of the Examiner.
177	Granted to the extent reflected in footnote 28 of our Decision herein, and otherwise *denied* for lack of decisional significance.
182	Granted to the extent reflected in footnote 30 of our Decision herein.
	Granted.

EXCEPTIONS OF FIDELITY TELEVISION, INC.

Exception No. (Findings)	
1	Granted to the extent that the record reflects RKO's media holdings as shown in its more recent amendments.
2–11, 13–15, 17–20, 22–52.	Denied. The Examiner's findings adequately and correctly reflect the record.
12	Granted to the extent reflected in footnote 23 of our Decision herein, but otherwise *denied* since the Examiner's findings adequately and correctly reflect the record.
16, 21	Denied for lack of decisional significance. See *RKO General, Inc. (WNAC–TV)*, 35 FCC 2d 100 (1972).

Exception No. (Conclusions)

Exception No.	*Ruling*
1, 2, 10, 11, 13, 14	Granted to the extent that our conclusions have been substituted for those of the Examiner.
3, 4	Granted to the extent that our conclusions have been substituted for those of the Examiner, but *denied* in all other respects since the record supports the findings in question.
5, 7, 8	Denied for the reasons stated in our Decision herein.
6	Denied for lack of decisional significance.
9	Granted to the extent reflected in our Decision herein.
12	Granted to the extent that our conclusions have been substituted for those of the Examiner, but denied in all other respects for the reasons stated in our Decision herein.

Exception No. (Rulings)

1–30	Denied. The Examiner's rulings contain no significant error.

Exception No. (Other Matters)

1–10	Denied. The Orders contain no significant error.
Final unnumbered exception.	Denied for the reasons set forth in our Decision herein.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Today's decision, granting RKO's renewal application for KHJ–TV in Los Angeles, may very well be the worst decision of this Commission during my term of seven years and five months.

(1) This proceeding began in 1965 when, on August 31, RKO filed an application for renewal for its station KHJ–TV in Los Angeles. Two months later, on October 25, Fidelity Television, Inc.—a newly-formed group—filed for a new television station on the same channel as KHJ–TV—Channel 9. Accordingly—after the Commission found both applicants fully qualified—the two applications were found to be mutually exclusive and a hearing was ordered.

Four years later Hearing Examiner Donahue issued his initial decision recommending that the license be granted to Fidelity, and that RKO's application for renewal be denied.

For reasons that have never been fully explained, the Commission majority waited for over two years before holding oral argument in this case on October 12, 1971.

It then waited an additional two years before rendering a decision in the case.

This delay has required the successful applicant, Fidelity, to go to the U.S. Court of Appeals for a writ of mandamus on not one, but two occasions. Today's decision is rendered only in the face of the threat of such a writ of mandamus.

(2) RKO has engaged in some of the most classic anticompetitive behavior imaginable in the use of its station. For example, the Pepsi-Cola Company was told that Pepsi-Cola would not be sold in the RKO General Tire plants unless Pepsi-Cola would advertise on KHJ–TV. Subsequently, Pepsi's advertising budget on KHJ–TV was increased, and the soft drink dispensers were installed. The record is replete with examples of this kind. It was the position of the Department of Justice

in its *amicus* brief filed with this Commission that if these findings of the Hearing Examiner are correct, RKO should be absolutely disqualified from continuing as a licensee of this Commission.

The Examiner did not take such a stern view of the matter. He did, however, find RKO to suffer a significant demerit as a result of its abuse of its monopoly power.

The Commission majority today finds RKO neither disqualified nor suffering a demerit for this behavior.

(3) The past programming of KHJ–TV was qualitatively somewhat less than mediocre. Fidelity made no effort to disguise the fact that it had deliberately sought to challenge the absolutely worst station in the Los Angeles area. It wished to be a successful challenger. There is nothing in the record of this case to suggest that it made an erroneous choice or that it should not be successful. The Hearing Examiner's description of the programming is as persuasive as it is colorful on this score.

In the *Moline*[1] case, this Commission found that the incumbent would be renewed even though it had not met its promised levels of programming, because the programming that it did in fact provide was not the most wretched imaginable. Now, in this case, confronted with such programming, the Commission finds it acceptable on the grounds that the incumbent never promised to do any more.

One is left with no other possible conclusion than that no programming—regardless of how bad it is or what was in fact promised—will ever be found to constitute a demerit against an incumbent licensee.

(4) There is simply no way that the record in this case can be read without concluding that Fidelity is the superior applicant under not just some, but all of the comparative criteria this Commission has conventionally used.

As for diversity of ownership, Fidelity is a new applicant which owns no other media in the area. (A 1% shareholder does have some interest in some suburban newspapers.) RKO, by contrast, owns an AM and an FM radio station in the market, as well as the television station, as well as numerous other broadcast properties in other markets throughout the United States. Clearly Fidelity is the superior applicant with regard to this comparative criterion.

As for local ownership, all of Fidelity's owners live in the Los Angeles area. None of RKO's owners lives in the Los Angeles area. Thus, once again, Fidelity must be found the superior applicant as to this comparative criterion.

The Commission has often emphasized the desirability of an integration of ownership and management—that is, that those who own the broadcasting facility actually participate in the management of it. Of Fidelity's ownership, a full 23% represents owners who will be involved full time in the operation of the station. None of the owners of RKO is involved in any way in the operation of KHJ–TV. Once again, Fidelity must be found the superior applicant.

Anticompetitive behavior was used by the Hearing Examiner as a comparative criterion, rather than disqualifying—as the Department

[1] *Moline Television Corp.*, 31 FCC 2d 263 (1971).

of Justice urged. I believe, with the Department of Justice, that KHJ–TV should be disqualified under the set of facts before us. But treating it as a comparative criterion, once again, Fidelity is found to be the superior applicant.

The Examiner also awarded comparative demerits to KHJ–TV for its excessive commercialization and its failure to editorialize. Although there would be circumstances under which I might find a failure to editorialize fully explicable, I do not believe those circumstances exist here. And I agree with the Hearing Examiner as to excessive commercialization. Thus, once again, Fidelity must be found to be the superior applicant.

Only as to past broadcast experience can RKO be said to have any advantage whatsoever and, given the nature of its performance, it is not clear how that can count much in its favor.

(5) Finally, I believe that Fidelity was deprived of the opportunity to which it is entitled in law to show what its proposed programming would be. See *Chapman Radio & Television Co.*, 5 F.C.C. 2d 416 (1966).

The majority cites no precedents for its holding in this case simply because there is none.

I may issue a more detailed discussion of this case at some future date, but this discussion is enough to highlight my despair over the Commission's abuse of statutes, past Court of Appeals decisions, and its own precedents in its strained effort to protect RKO's investment in KHJ–TV.

I dissent.

Dissenting Statement of Commissioner H. Rex Lee

I must dissent to the majority's decision to grant the application of RKO General, Inc. for renewal of license for Station KHJ–TV, Los Angeles, California, and to deny the competing application of Fidelity Television, Inc. for a new television station at Norwalk, California. The decision effectively ignores the impact of record evidence compiled with regard to reciprocal trade practices of General Tire and Rubber Company and its subsidiaries, including RKO, on the latter's qualifications to remain licensee of KHJ–TV, carefully avoids any attempt to consider the effect of serious issues specified against RKO in a comparative proceeding involving its Boston television station, WNAC–TV,[1] incorrectly assesses KHJ–TV's past broadcast

[1] On December 3, 1969, the Commission designated the renewal application for WNAC–TV for hearing with two competing applications. See 20 FCC 2d 846 (1969). The hearing issues included a determination of whether RKO should be disqualified as a broadcast licensee or issued a comparative demerit in view of alleged anticompetitive trade practices directly related to the operation of WNAC–TV and, therefore, was much broader than the issue tried in the KHJ–TV case. Subsequently, the Review Board enlarged the issues in the Boston proceeding to determine whether, in sworn testimony given during the course of the KHJ–TV proceeding, officers, employees and/or former employees of RKO or General Tire had misrepresented or concealed facts or had been lacking in candor in regard to the existence, nature and extent of reciprocal trade practices. Upon petition by the Broadcast Bureau, the Commission declined to reopen the KHJ–TV hearing record for the purpose of specifying issues similar to those in the Boston proceeding. However, it stated that, in the event RKO was found to be the preferred applicant on a comparative basis in the Los Angeles proceeding, the issuance of a final decision would be deferred until conclusion of the Boston case.

record and distorts the relevance of traditional comparative criteria in an attempt to favor an existing licensee.

Contrary to the majority's position, I believe that evidence of reciprocal trade practices by General Tire and RKO reflects adversely on RKO's licensee qualifications. The hearing record in this proceeding provides ample support for the proposition that General Tire and its subsidiaries engaged in substantial efforts to use corporate purchasing power to improve the profitability of KHJ–TV through the mechanism of reciprocal trade agreements, without regard to the quality of the station's programming. The record illustrates numerous instances where General Tire utilized reciprocal trade agreements to obtain advertising business for its radio and television stations, including KHJ–TV. In fact, the evidence shows that General Tire attempted to bring pressure on advertisers to buy time over RKO stations, often for reasons completely unconnected with the quality of programming being produced by the stations. For instance, as the result of extensive negotiations in 1962, General Tire and Pepsi-Cola concluded a "mutually beneficial association" whereby more Pepsi-Cola would be placed in General Tire plants in return for increased Pepsi-Cola radio and television advertising. As a result, Pepsi-Cola's advertising on KHJ–TV went from $3,500 in 1964 to $40,000 in 1965. Similarly, negotiations with Olin-Mathieson, which concerned the award of a fixed percentage of General Tire's needs for polyol for the synthetic rubber process, resulted in Olin-Mathieson advertising on KHJ–TV jumping from nothing in 1962 and 1963 to $12,350 in 1964.

Correspondence and other evidence of the relationship between Aluminum Company of America (Alcoa) and General Tire also indicated that the former's advertising on KHJ–TV resulted from the mutually-beneficial trade arrangement rather than from any particular desire to advertise on the station. Although Alcoa placed no advertising on KHJ–TV during 1962, 1963 or 1964, it spent $8,069 with the station in 1965. In a 1962 Trade Relations and Customer Activity Report of General Tire, it was noted that American Airlines' advertising agencies would drop RKO in 1963 and that, therefore, the company, where feasible, should refrain from using the airline. Although no money was spent on KHJ–TV advertising by American Airlines in 1962 or 1963, the airline did spend $14,500 and $9,650 in 1964 and 1965, respectively. Similar trade relations efforts with the Hertz Corporation resulted in that company's making the following expenditures on KHJ–TV: 1962–$63,550; 1963–$90,025; 1964–$20,400; 1965–$9,350.

These reciprocal trade practices obviously placed KHJ–TV's competitors at a disadvantage for reasons often unconnected with the quality of the station's programming or the size of the audience involved. Moreover, the existence of the corporate parent's economic pressure effectively destroyed any incentive for KHJ–TV to provide improved programming since the station had advertiser support available in any event. As the Department of Justice noted in its *amicus curiae* brief, filed in this proceeding on June 10, 1970, General Tire and RKO practiced overt reciprocity involving explicit agreements, which is destructive of competition and is inconsistent with the public

interest since, to the extent that a broadcast licensee can rely on reciprocal purchasing power to obtain advertising; it may cease to provide the quality of service which would have been necessary in a competitive atmosphere. In effect, Justice would find that reciprocal trading practices are *per se* violations of the antitrust laws and are anticompetitive in nature. Nevertheless, the majority stresses the fact that the civil antitrust action brought against General Tire and three of its subsidiaries, including RKO, on the basis of reciprocal trade practices was eventually terminated with the issuance of a consent decree and that, therefore, no determination was made that improprieties had occurred or that such practices, standing alone, violate the antitrust laws. The majority also points out that the "relevant legal and economic concepts were in a state of flux at the time" and that "many other corporations engaged in similar trade relations practices during this period."

In spite of the majority's attempt to minimize the impact of the conduct at issue here, the fact remains that General Tire and RKO engaged in reciprocal trading of a coercive nature which was intended to benefit the latter's radio and television stations and which did result in increased advertising revenues for KHJ–TV. Without addressing the question of whether the trade practices violated the antitrust laws, it is clear that RKO acted in derogation of the public interest by participating in anticompetitive conduct and that this Commission has the responsibility to prevent monopolistic domination in the broadcast field. See *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Moreover, the Justice Department's willingness to settle for injunctive relief of a prospective nature in its antitrust action against General Tire and its subsidiaries does not diminish the significance of the past trade practices found in the record of this proceeding—practices which were directly related to the operation of broadcast facilities. As a result, I must conclude that such conduct effectively precludes a finding that RKO possesses the requisite qualifications to remain the licensee of KHJ–TV.

Fidelity has claimed that the limited scope of the anticompetitive practices issue in this proceeding and the alleged lack of candor by RKO principals during the evidentiary hearing hampered its efforts to adduce evidence about General Tire's reciprocal trading activities. As noted previously, the Review Board added issues in the Boston proceeding concerning the candor of RKO and General Tire witnesses who had testified in the Los Angeles hearing with regard to the existence, nature and extent of reciprocal trade practices. While the Commission declined to reopen the record in this proceeding for the purpose of specifying the anticompetitive practices and candor issues already included in the Boston case, it did order that a final decision herein would be held in abeyance pending conclusion of the Boston case if RKO was held to be the preferred applicant on a comparative basis. However, on June 11, 1973, the United States Court of Appeals for the District of Columbia, in response to a petition for writ of mandamus filed by Fidelity, stated that a decision in this proceeding appeared to have been unreasonably delayed, and it asked for a report of the Commission's action within 30 days. On July 6, 1973, the Commission informed the Court that a decision herein would be prepared as

expeditiously as possible. Subsequently, Fidelity renewed its request for a writ of mandamus.

As the majority notes in its decision, it would be preferable to await the outcome of the Boston proceeding before acting on KHJ–TV's renewal application so that all questions about RKO's qualifications to be a broadcast licensee could be resolved at one time. Such a procedure is especially appropriate since the Boston case involves a broader issue on reciprocal dealing and an issue concerning the candor of RKO and General Tire witnesses in testimony during the evidentiary phase of this proceeding. It is more than obvious that these issues could have a profound impact on the final disposition of this case since if RKO is found to be disqualified as a broadcast licensee under either or both of these issues, it would not be entitled to a comparison with Fidelity. Of course, the majority attempts to avoid this procedural predicament by conditioning its grant of RKO's renewal application and its denial of Fidelity's competing application on whatever action is deemed appropriate following resolution of the Boston proceeding. However, such a course of action does not represent a *final* decision herein, which was promised by the Commission in its report to the Court of Appeals. I would have preferred to expedite the resolution of the qualifications issues in the Boston proceeding before attempting a comparison of the RKO and Fidelity proposals.

Even if I assumed that RKO possessed the basic qualifications to remain licensee of KHJ–TV, I could not agree with the majority's analysis of the station's past broadcast record and its comparative evaluation of the RKO and Fidelity proposals. Initially, it should be noted that the majority has decided to follow the approach taken in *Moline Television Corp.*, 31 FCC 2d 263 (1971), by assessing all relevant comparative criteria, including the past broadcast record of the renewal applicant. Of course, in relying on the traditional comparative criteria as articulated in the 1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, the majority's decision squarely conflicts with the Commission's holding in *A. H. Belo Corp.*, 40 FCC 2d 1131 (1973), appeal pending, U.S. App. D.C. No. 73–1673. In *Belo*, the Commission stated that whether a renewal applicant's past broadcast record warrants a "plus of major significance" is of crucial importance in the judgmental process and that there is no need to rely on presumptions concerning integration of ownership and management, local residence, etc. in determining how the applicant will respond to community needs and interests.

The approach in *Belo* is based on the Court of Appeals' opinion in *Citizens Communications Center* v. *F.C.C.*, 145 U.S. App. D.C. 32, 447 F. 2d 1201 (1971), which held that licensees should be judged primarily on their past performance, that insubstantial past performance should preclude renewal of license, but that superior performance (as measured by such factors as the elimination of excessive and loud advertising, the delivery of quality programming and the reinvestment of profits for the benefit of station audience) should result in a plus of major significance in renewal-new applicant proceedings.[2] The Court also stressed that the Commission should strive to clarify in both quan-

[2] The Court's opinion precluded the use of the Commission's 1970 Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424.

titative and qualitative terms what constitutes superior service. In its general inquiry in Docket No. 19154, the Commission singled out the areas of local programming and news and public affairs programming as indicative of substantial service and although it stated that the proposed standards would not be applied to any pending renewal proceeding, the Commission suggested that independent television stations in the top 50 markets with revenues over $5,000,000 should provide about 15% local programming, including 15% in prime time; about 5% news programming, including 5% in prime time; and about 5% public affairs programming, including 3% in prime time.[3]

Using any test of past performance, I can only conclude that KHJ–TV's broadcast record must be weighed against it in the comparative evaluation of the applicant's proposals. While I recognize, as does the majority, that KHJ–TV has presented a number of outstanding entertainment specials and has received several awards and favorable public comment, the record clearly shows that the station placed greatest emphasis on the presentation of motion pictures and broadcast very little regularly-scheduled local live or public service programming during prime time; used news programming to fill in spots between feature movie presentations; and showed little responsiveness to the serious criticism of its viewing audience. Analysis of composite week data indicates that the station carried 86.5% entertainment programming; 3.375% news; 3.75% education; 3% talks; 3.375% religious, agricultural and discussion; and 7.13% live programming. In comparison with the three other independent VHF stations in the market, KHJ–TV had the highest percentage of entertainment programming, the lowest percentages in the news and discussion categories and the lowest percentages of live programming for both the total day and prime time.[4] Therefore, very serious questions are raised concerning the licensee's broadcast record in view of the limited news and public affairs programming on KHJ–TV, the station's failure to editorialize during the period in question, its stress on heavily-commercialized movie features and its unwillingness to respond to public complaints, especially those relating to movie exhibition. To the extent that the hearing record shows numerous deficiencies in KHJ–TV's broadcast record, it is not entitled to a plus of major significance as was awarded to the renewal applicant in *Moline*. In fact, it could be argued that KHJ–TV's "insubstantial past performance" precludes license renewal. In any event, the station's record must be considered as a minus factor in the comparative evaluation rather than as one within the bounds of average performance as the majority concludes.

In regard to the other comparative factors discussed by the majority, I believe that Fidelity is entitled to preferences for diversification of the media of mass communications, integration of ownership with management and local ownership. Under the diversification factor, I

[3] See Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580, adopted February 17, 1971. On August 4, 1971, the Commission adopted a Further Notice of Inquiry (31 FCC 2d 443) in light of the *Citizens Communications Center* decision and indicated that the Court's decision reinforces the need to resolve the matters at issue in Docket No. 19154.

[4] In *Moline*, the Commission accorded a network-affiliated, renewal applicant a plus of major significance for a past broadcast record that included 14.9% local live programming, including 11.7% in prime time; 4.3% news; the absence of program complaints; and a favorable showing in comparison with market competitors in local live programming. KHJ–TV's past broadcast record suffers by comparison.

note that while RKO owns and operates AM–FM stations in Los Angeles and other stations in other cities across the country (and numerous cable systems and media-related enterprises), neither Fidelity nor its stockholders have any interest in an existing broadcast facility—although one stockholder has a 10% interest in a cable system and another stockholder has a 26% interest in a corporation publishing newspapers in several Los Angeles area suburbs. The majority concludes that even though RKO clearly has more media interests than Fidelity, the nature of the interests has no adverse effect on the flow of information to the audience to be served, especially since there is a plethora of media outlets already in existence in the area. However, such a position effectively undercuts the diversification criterion and while I am sympathetic to the majority's point that any attempt to restructure ownership patterns in the broadcast industry should be accomplished through the rule making process rather than on an *ad hoc* basis, the fact remains that the Commission's 1970 Renewal Policy Statement was rejected by the Court of Appeals; that the inquiry in Docket No. 19154 has not been concluded; and that the majority professes to evaluate the applicants on the basis of traditional comparative criteria, one of which has been diversification.

In similar fashion, Fidelity should be awarded a preference for the integration factor since it proposes substantial integration of ownership with management in the operation of the Norwalk facility while RKO has had and will have none. Two persons, both local residents and active in civic affairs, with over 22% of Fidelity's stock would occupy full-time positions with the proposed station as general manager and director of public service programming while none of RKO's management personnel has any significant ownership interest in the licensee. While the majority concedes the quantitative superiority of Fidelity's integration proposal, it downgrades the qualitative aspect of the proposal since Fidelity principals lack broadcast experience and since the applicant's behavior before the Commission has raised questions about its ability to implement an integration proposal.[5] However, the mere absence of broadcast experience is insufficient to raise doubts about the *bona fides* of the integration proposal and, as pointed out in the 1965 Policy Statement on Comparative Broadcast Hearings, an emphasis on such experience could effectively discourage the entry of qualified newcomers into broadcasting. See 1 FCC 2d at 396 (1965). In addition, the Broadcast Bureau's earlier request to reopen the record and to add issues dealing with the preparation, signing and filing of stock subscription agreements, application amendments and affidavits by Fidelity was denied by the Commission, and the majority now dismisses RKO's request for Section 1.65 issues even though it professes to be disturbed by the questions raised and indicates that ordinarily a remand for further hearing would be necessary. The majority cannot have it both ways. It cannot reject or dismiss requests

[5] On December 24, 1969, the Broadcast Bureau filed a petition to reopen the hearing record and to enlarge the issues in this proceeding, based on questions concerning the filing by Fidelity of stock subscription agreements, amendments of its application and affidavits which indicated the participation of Kenneth E. BeLieu in the applicant. On August 16, 1971, RKO filed a petition to dismiss Fidelity's application or, alternatively, to enlarge the issues and to reopen the hearing record. RKO asserted that an amendment to Fidelity's application reflects a fundamental change in corporate structure which was not timely reported to the Commission as required by Section 1.65 of the Rules.

for hearing issues and then use the questions raised by the requests against the applicant in the comparative evaluation. Such an approach seriously prejudices the rights of an applicant, but it is apparently employed here to diminish the effect of Fidelity's superior integration proposal and to undercut the integration factor in renewal-new applicant proceedings.

The majority then attempts to isolate "other factors," which tip the comparative scales in favor of RKO, after finding that both applicants are basically qualified, but that none of the differences in the proposals are decisional. These "other factors" consist primarily of a recitation of the investment made by RKO in KHJ–TV and of the need for insuring predictability and stability in the broadcast service. Of course, such "factors" are present in every renewal-new applicant proceeding, and I question whether they assume any independent relevance outside of the context of past broadcast record. While I am most sympathetic with the majority's desire to articulate some meaningful standards to govern the comparison between renewal and competing applicants, I cannot agree that an *ad hoc* approach is desirable. I so stated in my concurring statement in *A. H. Belo*, and I continue to adhere to that position. So that while I may concur with the general statement of policy that a licensee's actual past performance is of crucial importance in a comparative proceeding and with the need to clarify the scope of the comparative issue in a renewal-new applicant proceeding, I cannot agree that an isolated decision or designation Order is the proper vehicle for the delineation of major policy by the Commission. The general inquiry raised in Docket No. 19154 is whether we can formulate some definitive guidelines for application in a comparative proceeding involving a regular renewal applicant, and it seems obvious that any major policy pronouncements in this important area of broadcast regulation should be contained in a report and order in Docket No. 19154.

In summary, I have dissented to the majority's decision here because I believe that the anticompetitive practices engaged in by General Tire and RKO, which inured to the benefit of KHJ–TV, reflect so adversely on the licensee's qualifications that the renewal application should be denied. Moreover, the issues specified in the Boston proceeding concerning trade practices and the candor of General Tire and RKO witnesses in the Los Angeles hearing should be resolved prior to the disposition of this case (in spite of the Court of Appeals' apparent willingness to entertain a writ of mandamus) so that the Commission can determine whether RKO is entitled to a comparative evaluation with Fidelity. Even if I assume that RKO is basically qualified to remain a licensee, it must fail in a comparison with the challenger, whose preferences include diversification, integration and local ownership, since RKO must be assessed major comparative demerits for its past broadcast record and for its reciprocal trade practices.[6] Therefore, I dissent.

[6] The majority decision does not even mention reciprocal trade practices in the comparative evaluation of the applicants even though the Trial Judge below found that RKO's participation in General Tire's reciprocal dealing subverted the public interest and justified a major discredit.

F.C.C. 69D–43

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RKO GENERAL, INC. (KHJ–TV), LOS ANGELES, CALIF. For Renewal of Broadcast License	Docket No. 16679 File No. BRCT–58
FIDELITY TELEVISION, INC., NORWALK, CALIF. For Construction Permit for New Television Broadcast Station	Docket No. 16680 File No. BPCT–3655

APPEARANCES

Harold David Cohen, *William S. Green*, and *J. Laurent Scharff*, on behalf of RKO General, Inc.; *Edward P. Morgan*, *Robert N. Green*, and *Walter H. Sweeney*, on behalf of Fidelity Television, Inc.; and *Anthony J. Sobczak* and *John F. Reilly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission (limited participation only).

INITIAL DECISION OF HEARING EXAMINER THOMAS H. DONAHUE

(Issued August 11, 1969; Released August 13, 1969)

PRELIMINARY STATEMENT

1. On August 31, 1965, RKO filed an application for renewal of license covering its station KHJ–TV on Channel 9 in Los Angeles. On October 25, 1965, Fidelity filed an application for a construction permit for a new television station to operate on Channel 9 in Norwalk, California.

2. On June 8, 1966, the Commission issued an order (FCC 66–503) finding both the RKO and Fidelity applications qualified for grant and also finding them mutually exclusive. Hearing was directed on these issues:

1. To determine which of the proposals would better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The order carried the following footnote to the designation clause:

"2 The Commission in its *Policy Statement on Comparative Broadcast Hearings*, (FCC 65–689, released July 28, 1965, 30 F.R. 9660, 5 R.R. 2d 1901), indicated that it did not therein attempt to deal with '* * * the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.' That remains our position. However, we have also, subsequently indicated (*Seven (7) League Productions, Inc., et al.*, 1 FCC 2d 1597–9) that the Policy Statement will govern the introduction of evidence where a renewal application is being contested. For example, as in regular comparative hearings, evidence relating to programming proposals and to character will not be entertained in the contested renewal proceeding unless first specifically put in issue by the Hearing Order or on subsequent enlargement of issues upon a threshold factual showing that a distinctive difference or deficiency exists and is worth exploring. We have not, however, reached any determinations as to weight to be accorded various factors of difference between the renewal applicant and the competing applicant, preferring instead to do so later upon the full, factual hearing record that is developed by competent evidence under the designated issues. According[ly], parties in a contested renewal proceeding are free to urge any arguments they may deem applicable concerning the relative weight to be afforded the evidence bearing on the various comparative factors developed at hearing."

3. On June 27, 1966, Fidelity filed a Petition to Enlarge Issues. The issues sought read:

(a) To determine whether a grant to one or the other of the applicants would provide the more fair, efficient, and equitable distribution of television service.

(b) To determine the "service philosophy" of each applicant and the matters on which the applicants rely in support thereof.

(c) To determine the significant differences between the applicants with respect to the programming service proposed in each application.

On the same date RKO filed a Petition to Clarify the Issues or, in the Alternative, Enlarge the Issues. This pleading requested that the issues be clarified to embrace the record of RKO, or in the alternative, the issues be enlarged to permit the introduction of evidence concerning RKO's record of performance.

4. On July 11, 1966, a prehearing conference was held. The conference was largely devoted to a discussion of under what issues the hearing was to be tried and how, under the Commission's processes, answer to that question could or should be obtained. The Broadcast Bureau announced that since the hearing was to be a comparative hearing it would not participate.

5. On July 29, 1966, another prehearing conference was held. At that conference the Examiner ruled that, in accordance with the Commission's Policy Statement, he would hear threshold presentations on whether RKO should be permitted to make a showing, at hearing, on KHJ–TV's past record of performance, particularly in respect to past record of programming.

6. On September 26, 1966, the Review Board released a Memorandum Opinion and Order (FCC 66R–368) denying RKO's petition of June 27, 1966, to enlarge or clarify the issues. On October 31, 1966, the Board released a Memorandum Opinion and Order (FCC 66R–430) denying Fidelity's petition of June 27, 1966, to enlarge issues.

7. On September 30, 1966, the Examiner heard the threshold showing noted above. Following these presentations he ruled that the past broadcast record of KHJ–TV and, to a limited extent, the record of RKO were to be considered within the scope of the issues.

8. On November 7, 1966, Fidelity filed with the Commission a pleading called "Application for Review of Review Board Order Denying Requested Issues." This pleading sought reversal of the Board's denials of Fidelity's June 27, 1966 petition. By order released December 29, 1966 (FCC 66–1172), the pleading was denied.

9. Hearing got underway on February 27, 1967. Between February 27, 1967 and June 15, 1967, 24 days were spent in hearing. The record closed on the latter date.

10. During hearing, on March 8, 1967, Fidelity filed a Petition for Enlargement of Issues and for Other Relief. These issues were sought:

> To determine, in light of all the facts and circumstances surrounding the Complaint filed by the United States of America on March 2, 1967, against General Tire and Rubber Company, Aerojet-General Corporation, A. M. Byers Company, and RKO General, Inc., whether RKO General, Inc., is qualified to be a licensee of the facility for which it is applying herein, or alternatively, whether such matters bear upon the comparative qualifications of RKO General, Inc.
>
> To determine the extent of involvement by RKO General, Inc., and related corporations in the communications and entertainment fields, including, but not limited to such things as the production and distribution of films and other program material, and ownership and operation of broadcast stations, CATV systems, and theaters; whether there exists a concentration of control and ownership of production, distribution, and exhibition facilities that discourages free competition or is otherwise inconsistent with the public interest; and whether any matters so adduced reflect adversely on RKO General, Inc., to the point of requiring its disqualification herein or the assessment of a comparative demerit.

By Memorandum Opinion and Order, released June 20, 1967 (FCC 67R–239), the Review Board denied this petition. The Board further ordered that if grant were to be made to RKO it should be made without prejudice to whatever action, if any, the Commission might deem appropriate as a result of a pending civil action, filed March 2, 1967, in Federal Court, *U.S.* v. *General Tire, et al.* (No. 6–67–155), U.S.D.C. No. Dist., Ohio.

11. On March 9, 1967, Fidelity filed a Petition for Special Relief with Respect to Application for Review. Through this pleading Fidelity sought designation of these issues:

> (a) To determine on a comparative basis the significant differences between the applicants with respect to the programming that they propose to provide to the community and area each would serve.
>
> (b) To determine on a comparative basis the significant differences between the applicants with respect to the efforts made by each applicant to ascertain the needs and interests of the community and area each proposes to serve.

As an alternative to the Commission's adding the requested issues, request was made that the Review Board be directed to make a determination whether such issues should be added. The Commission by Memorandum Opinion and Order released July 12, 1967 (FCC 67–694), denied the petition.

12. On June 30, 1967, Fidelity filed with the Review Board a Petition for Clarification. The pleading requested the Board to clarify its Memorandum Opinion and Order of June 20, 1967, so as to remove any doubt that Fidelity, under the issues, "be permitted to adduce all relevant and material evidence susceptible of development within the ambit of the Commission's Rules bearing upon the charges contained in the anti-trust complaint, particularly as they relate to RKO's broadcast practices." The petition was denied by a Review Board Memorandum Opinion and Order released August 28, 1967 (FCC 67R–359).

13. On July 24, 1967, Fidelity filed a Petition for Clarification or in the Alternative for Enlargement of Issues. That pleading sought these issues:

(a) To determine on a comparative basis the significant differences between the applicants with respect to the programming proposed by each applicant.

(b) To determine on a comparative basis the significant differences between the applicants with respect to the efforts made by each applicant to ascertain community needs and interests.

By Memorandum Opinion and Order released September 22, 1967 (FCC 67R–400), the Review Board denied the petition.

14. On February 9, 1968, Fidelity filed a Petition to Reopen the Record. The pleading sought opportunity to present newly discovered evidence relating to reciprocal trade practices of RKO.

15. On February 19, 1968, Fidelity filed a Petition for Reconsideration and for Enlargement of Issues. This pleading asked the Review Board to reconsider its order of June 20, 1967.

16. By Memorandum Opinion and Order released March 11, 1968 (FCC 68M–394), the Examiner ordered that the record be reopened and that a conference be held looking toward further hearing. In the order reopening the record the following statement was included concerning the scope of future proceedings:

The record is not being reopened for review of the trade practices of General Tire and Rubber and its subsidiaries. It is not being reopened as a repository for the record in the Ohio anti-trust suit. The Examiner is not inviting a do-it-yourself kit of undigested data sealed with a promise that some of it may be material to the qualifications of RKO. Petitioner asks that the record be reopened for the purpose of taking evidence on the reciprocal trade practices of RKO. With the caveat that such evidence must be patently germane to RKO's stewardship of KHJ–TV that language is adopted as words limiting the scope of future hearing.

17. Further prehearing conferences were held on March 18, April 10 and April 15, 1968. A hearing conference was held on August 15, 1968. Hearings under the reopened record were held for 12 days between June 12, 1968 and August 26, 1968. The record closed on the latter day.

18. On May 10, 1968, the Review Board released a Memorandum Opinion and Order denying the Petition for Reconsideration and for Enlargement of Issues filed by Fidelity on February 19, 1968 (FCC 68R–196).

19. On May 17, 1968, Fidelity filed an Application for Review. This pleading asked the Commission to reverse the Review Board and grant the relief requested in its Petition for Reconsideration and for Enlargement of Issues.

20. On September 9, 1968, the Commission by Memorandum Opinion and Order ruled on Fidelity's Application for Review of May 17, 1968 (FCC 68R–892). The Commission ruled that the development of events had given Fidelity substantially what it sought by its petition except for a disqualification issue. On its own motion the Commission added this issue:

To determine, in light of the evidence adduced with respect to the preceding issues, whether RKO General, Inc. should be disqualified or, if not, whether a comparative demerit should be assessed against it in this proceeding.

21. Proposed findings of fact and conclusions were filed on the first two issues by RKO and Fidelity on September 15, 1967. Reply findings were filed by both applicants on October 20, 1967. Supplemental proposed findings and conclusions on the trade practice segment of

the hearing were filed by Fidelity on October 28, 1968 and by RKO on December 9, 1968. On January 31, 1969, Fidelity filed a motion to strike and reply to the supplemental findings and conclusions of RKO. On the same date the Broadcast Bureau, who as previously noted, did not participate in the proceeding, filed proposed findings and conclusions addressed solely to the reopened record.

FINDINGS OF FACT

(First Phase of Hearing)

General Tire and Rubber Its Composition and Scope

22. RKO General, Inc., licensee of the facility at issue, is a wholly-owned subsidiary of The General Tire and Rubber Company. General Tire is a large conglomerate with headquarters in Akron, Ohio and New York City. The *Fortune Directory* of the 500 Largest U.S. Industrial Corporations ranks General Tire 97th for 1968 and 90th for 1967. *Fortune*, May 15, 1969, pg. 170 (Official Notice Taken). General Tire's stock is, of course, sold on the New York Stock Exchange. Voting stock numbers about 17 million shares. Stockholders number about 40,000. Aside from brokers and their representatives, no single stockholder holds as much as 3% of the stock. The O'Neil brothers, Thomas, M. G., and John, together hold about 5%. Other members of the O'Neil family have some stock interest. Thomas O'Neil is Chairman of the Board, M. G. is President, and John a Director.

23. As of November 1966 General Tire controlled about 125 companies. Together with its subsidiaries, it manufactures and distributes a wide variety of products and furnishes numerous services. Besides automobile tires, General Tire produces and distributes: rocket power plants; rocket propulsion systems; chemicals; space system components; military ordnance components; metal and wrought-iron goods; electronic equipment; metals; chemicals; plastics; and rubber goods. In the field of services, it furnishes: architecture; engineering and construction management; commercial air transportation; theatres; outdoor advertising; and community antenna television (CATV).[1]

Broadcast Interests

24. Among the services sold by General Tire, not noted above, are radio and television broadcasting. RKO General, Inc., under which title General Tire handles the bulk of its broadcast business, is licensee of standard, FM, and television stations in Boston, New York, and Los Angeles. It is licensee of standard and television stations in Memphis and has a construction permit for an FM station there. It is licensee of a standard broadcast station in Bethesda, Maryland, and an FM station in Washington, D.C. Through another subsidiary General Tire holds license for a UHF station in Hartford, Connecticut, which furnishes a subscription television service. Through a Canadian-owned corporation and RKO, General Tire is also licensee of standard,

[1] General Tire owns numerous CATV facilities in Arizona, California, Kansas, Mississippi, Missouri, New Mexico, Oklahoma, and Texas. It also owns a substantial interest in, and is in the process of obtaining control of, H and B American Corp., the largest CATV operation in the country.

FM and television stations in Windsor, Ontario. Since 1942 it has operated the Yankee Network, which, in 1942, had about 25 affiliates, as well as the Colonial Network, a subsidiary programming service.[2]

Some Contributions to Broadcasting

25. Technically, RKO has been active in the field of radio. In the 1940's, it experimented with FM broadcasts from Mt. Washington, the highest point in New England. In 1948 it moved that operation to Boston (WNAC–FM, later WRKO). At WGMS–FM in Washington it claims leadership in the field of stereo-broadcasting. In 1950 it developed a technique for filter treating light projection sources for film and cameras which became widely used in the industry. In 1951 it developed a Gamma corrected modulator for television transmitters. In 1952 it developed an automatic video control. In 1953 it developed a system of P.F. patching for emergency power cutback of television transmitters. In 1955 it developed an automatic control of set-up or black level for transmission of network video, thus overcoming certain distortion problems. In 1961 it became one of the first to remotely control a 50 kw AM transmitter. In 1963 it pioneered the development of dual horizontally and vertically polarized FM signals. In the same year it pioneered quartz lighting for TV remote pickups. In 1964 it claimed to be the first station to install permanent studio, control room type color remote setups. These installations were located at Shea Stadium and Madison Square Garden. In the same year, it claimed a first in utilizing a spectrum oscilloscope to monitor modulation percentage of an FM transmitter. In 1964 it also erected the tallest self-supporting antenna tower in the East (1066 feet). Located in a hurricane zone, the tower is designed to admit structural failure, only, at a wind velocity of 251 miles per hour. In 1964, RKO also pioneered and developed the first parallel transmitter operation in the nation, a development that has found favor with a number of other television stations.

26. RKO pioneered subscription television. In 1960 it applied for authorization to conduct subscription TV in Hartford over its UHF station there, WHCT. RKO was the only broadcaster to conduct such a trial. It pledged expenditures of up to $10,000,000 to make the effort. The trial is now in its fifth year and serves 7,000 customers. Information on, and analysis of, the operation has consistently been furnished to the Commission.

27. RKO has contributed to educational broadcasting through financial gifts and the making of equipment and program material available to educational stations. In New York it pledged a total of $350,000 to the educational stations there. In Los Angeles it similarly pledged $100,000. In Memphis $78,000 in cash and equipment was donated to the educational station. Gifts have also been made to Pepperdine College for a speech improvement project and equipment has been donated to Emerson College for its television course.

---

[2] At one time RKO had a controlling interest in the Mutual Network, the largest radio network in the nation, having 569 affiliates. It sold this property in 1957. It also operated the Don Lee Network for some eight years, a west coast network having about 45 affiliates.

28. RKO has also contributed to the development of new program sources for television. It experimented with live programming but decided that costs were prohibitive. It then turned to feature motion picture film. There it encountered resistance from the movie industry. However, before 1955 it had bought some 30 feature length films from the Bank of America and in 1955 it acquired RKO Radio Pictures, Inc. and with that company over 600 feature length films. These steps pioneered the presentation of movies over television and aided RKO's Los Angeles and New York stations in becoming economically viable in highly competitive markets. RKO has also either produced or participated in the financing of other material for television programs. These productions have appeared not only on RKO-owned but on other television stations. Included in production efforts in this area are such features as: Ladies of the Press, In Search of a Solution, Hollywood Backstage, Firing Line, Politics '64, Marcel Marceau, Surf's Up, Hollywood A-Go-Go, Man in Space, Fashion: Italian Style, Matisse, International Aero Classic, The Great Mini-Skirt Rebellion, Festa Italiana, Murray the K at Shea, The Plundered Art of Europe, The Al Capp Show, Rembrandt Exhibit. Also included are a number of sports features including: Griffith-Gonzales Fight, 59th Annual Millrose Games, 47th Annual Knights of Columbus Meet, ICAA Track Meet, Invitational Tennis Tournament, Tiger-Griffith Championship Fight, National Horse Show, Turf Classics. RKO has operated a Washington News Bureau for several years and, through that Bureau, has produced both national and local public affairs programs for its stations as well as for syndication.

Method of Operation

29. General Tire and its subsidiaries are a highly integrated organization. Out of the conglomerate's headquarters come policies which govern its activities. The organization is not, however, leaderless nor, on the basis of this record, does it fail to present focus for the assessment of responsibility for its acts. Thomas F. O'Neil, Chairman of the Board of General Tire, John B. Poor, President of RKO General, Inc., Hathaway Watson, President of RKO General Broadcasting Division of General Tire, and Malcolm C. Klein, Vice President and General Manager of KHJ–TV, as well as numerous other corporate officials, appeared and testified in this proceeding. Whatever curiosity existed over the internal operations and policies of General Tire, RKO, and KHJ–TV did not go unsatisfied in this record by any dearth of witnesses competent and available to testify on the subject.

30. RKO, or precedessor General Tire subsidiaries, have operated radio stations for 25 years. KHJ–TV was acquired in 1951. The station, under RKO, has never had a network affiliation.

31. The policy of RKO is to have management aware of community needs and to present programs which inform and stimulate interest. The objective is to broadcast programs which find acceptance and provide amusement, relaxation and, at times, instruction. RKO requires station management to provide these things as well as to become involved in community affairs, and maintain sensitive relationship with the community. Responsibility for the foregoing rests with local

management but headquarters inspects, encourages and insures compliance with company policy.

32. RKO believes that through orientation with the communities served its stations can be senitive to community need and be able to attract audience. RKO has some network affiliated stations and some not so affiliated. It has stations located in different parts of the country. Because of these factors it does not consider it feasible to originate programs from a single source.

33. Degree of delegation of authority to the local level is the responsibility of national headquuarters staff and its accomplished through the hiring of station managers. These, subject to headquarters approval, select staff such as program directors who have a voice in the station's relationship with the community both on and off the air. RKO believes the selection of good men is important and that station managers are not interchangeable. As a matter of policy, each RKO station is required to "take into account" the needs and tastes of the community; the program plans of other stations in the market; the station's "capabilities"; and the availability and cost of programs.

34. RKO believes it cannot compete with network affiliates on national and international news and documentaries. Nor, do RKO stations editorialize. RKO takes the position that if need is met by other stations, duplicating effort by it is unnecessary. RKO program formats vary between stations.

35. RKO headquarters is not passive on programming. It approves general program formats and reviews program schedules in light of the several stations' reasoning and headquarters' knowledge of market characteristics. Statistics are required from the stations on program categories to assure that pledges to the Commission are kept. Stations are monitored from time to time. Lists of feature films to be presented are reviewed and occasionally changes are suggested. Headquarters participates in the development of public service vehicles. In the production or acquisition of films for station use headquarters consults frequently with the stations concerning needs and uses.

36. The theory is that the station plays a major role in programming to meet a corporate "goal" of community service. Headquarters' function is one of stimulating, reviewing and inspecting programming with ultimate responsibility for approval of the programming presented by the station.

37. It is the policy of RKO to insure that stations comply with FCC rules. Headquarters provides legal and engineering assistance and from station reports satisfies itself that rules requirements are being met. Headquarters has a continuing interest in Commission policy pronouncements. When possible, it seeks to advance Commission objectives. When it decides it should, it makes in-depth studies alone or with other broadcasters and comments to the Commission on the results of these studies. It has participated in this way in numerous rule making proceedings.

Some Economic Data

38. RKO asserts that it has had a considerable financial struggle at KHJ–TV. It acquired the station in 1951. It reported net losses for

the first four years and for two of the next four. By fiscal 1960, however, it had recouped early losses and moved into an overall profit position. It asserts that resources derived from its other enterprises enabled it to sustain the losses until it acquired a profit position.

39. An economist testified that during the first third of KHJ–TV ownership by RKO the station sustained financial loss; during the second third it experienced sub-standard profitability; and during the last third the station showed good profitability and return relative to past experience. Higher profitability the economist attributed to greater expenditures for programming which drew more audience and hence more advertisers.

40. Before tax, operating profits earned by Los Angeles stations in 1965 totalled $27 million with an overall profit return of 33.4%. KHJ–TV shared about 6% of the total profits. Its share of Los Angeles TV profits for other years was: 1957—4.1%; 1958—1.1%; 1959—4.3%; 1960—1.8%; 1961—4.1%; 1962—5.6%; 1963—6.4%; 1964—8.1%.

41. In 1965 in the 106 markets in this country with three or more television stations, before tax, profit margins for the stations were 34.9%. KHJ–TV profit margin was 19.8%. In those markets having less than three stations, similar profit margin was 19.7%.

Personnel

42. Liaison between General Tire and that part of its radio interests to which KHJ–TV belongs is largely the responsibility of Hathaway Watson. Watson is a graduate of Harvard and of the Harvard Graduate School of Business Administration. From 1943 to 1951 he was with the Federal Government at Lend-Lease, the State Department, and the National Security Resources Board. In 1951 he went with Booz, Allen & Hamilton, management consultants. There he became a partner in charge of the Washington office. He left Booz-Allen to go with General Tire in 1959 after having served a year as consultant on General Tire's broadcast interests. Since 1963 he has been a member of the Research Committee of the National Association of Broadcasters. In 1965 he served on the Council for Television Development and was Chairman of that organization's "Research Committee." Sam Slate carries the title "Vice President, RKO General Broadcasting." Slate has held the title since January 1964. He is a graduate of the University of Georgia. He has been in broadcasting more than 30 years. He has been with United Press, CBS News and Press, Phillips H. Lord, Inc., U.S. Maritime Service, and the British Broadcasting Corporation. He has been a Vice President of CBS and was once General Manager of one of its stations, WCBS. He has written and produced numerous television programs. He has written a book on "Broadcasting" and was President of the New York State Broadcasters Association. For his productions he received a Peabody Award and a Presidential Citation.

43. Individuals who play a role in supervising the day-to-day operation of KHJ–TV include:

> *Malcolm C. Klein*, KHJ–TV's manager (he bears the title "Vice President and General Manager, KHJ–TV") is a native of Los Angeles. He graduated from the University of California. Entering broadcasting in 1948 at KLAC–TV, now KCOP, Los Angeles,

he moved through the ranks: stage department, direction, production, head of film department and manager of operations. In 1953 he went with KABC–TV in Los Angeles in the sales department. There he became Assistant General Sales Manager. In 1959 he went to New York as Vice President and General Manager of WNTA, Channel 13, Newark. In May 1960 he returned to Los Angeles as General Manager of KHJ–TV. He lives in Encino, California. He has served on the Board of Governors of the Academy of Television Arts and Sciences, on the District Attorney's Advisory Council, on the Public Relations Committee of the Southern California Symphony Association, and on the City of Hope Board of Trustees.

Hugh F. Del Regno is Controller of KHJ–TV. He has been with the station since 1963, having previously worked for Curtis-Wright and NBC. He has a degree in management and accounting from Fordham and a master's degree in business administration from New York University. At the station he has responsibility for auditing and accounting, personnel administration and building maintenance. He belongs to several professional organizations and the Urban League (Los Angeles Chapter), the U.C.L.A. Art Council, and the Los Angeles County Museum of Art (charter member).

Wally Sherwin is Director of Programming at KHJ–TV. He has lived in the Los Angeles area 20 years. He went to Northwestern University. He has been in broadcasting or show business for nearly 30 years. He is on the Mayor's Music Advisory Board (Los Angeles), is a member of the National Association of Television Programming Executives, the Academy of Television Arts and Sciences, the Hollywood Advertising Club and the Milline Club. He has assisted several civic groups in fund-raising drives and is active in youth organizations centered around three local high schools.

Charles P. Dwyer is General Sales Manager of KHJ–TV. He has been in the radio sales field since 1946 and has worked for numerous broadcast stations, networks and advertising agencies. He has been with KHJ–TV since 1964.

Allan Moll is Director of News and Public Affairs at KHJ–TV. He started out in Utah in law where he practiced for seven years. He then shifted to journalism. For 27 years he has been active in the broadcast news field. He was with two Salt Lake City radio stations, was news editor of the Intermountain Network, and was regional correspondent for an NBC news show. He was twice nominated for Peabody and Sylvania awards. He was chairman of the Governor of California's Committee on Emergency Broadcasting and member of a local committee on reporting of civil disorders. He is a member of the Radio Television News Directors Association, the Utah State Bar Association, and the Radio and TV Law Enforcement Committee of the National Conference of Christians and Jews. He is also co-chairman of a division of the United Jewish Welfare Fund. In the past he has headed the Utah Heart Fund Drive and has been treasurer of a home owners association.

Bryan T. Cole is Manager of Operations and Facilities at KHJ–TV. He is a graduate engineer (University of Oklahoma B.S.) and has taken additional electrical engineering work at other universities and in the Army. He is a registered electrical engineer in the State of California. He is Vice President of the Long Beach Chapter of the California Society of Professional Engineers, is a member of the National Society of Professional Engineers, the Institute of Electrical and Electronic Engineers, and the Society of Television Engineers. He is active in a number of civic organizations in Long Beach.

Terry Anderson, the Director of Film Programming at KHJ–TV, is a native of the Los Angeles area. He joined KHJ–TV in 1958 as assistant film editor after one year with Desilu Studios. He lives in Canoga Park, and is a member of the Knights of Columbus, Catholic Press Council, and U.S. Army Reserve.

Mark Davidson has been with KHJ–TV since 1964. In early 1965 he started broadcasting an interview program which later was carried once a week. The program was called "Reporter at Large." Before joining KHJ–TV he was with the Steve Allen Show for a year, and before that spent nine years as a writer for documentary films. Programs he worked on won two Academy Awards. He has an M.A. from Columbia and a B.A. from U.C.L.A. He has worked on a newspaper and for a news magazine.

Ascertainment of Community Need

44. Except for the requirement that company policies be adhered to, there is no evidence that General Tire or RKO headquarters attempt to intrude upon the autonomy of station managers insofar as the day-to-day programming of their respective stations is concerned. During the most recent license renewal period, KHJ–TV personnel met with those whom they considered to be civic leaders. Monthly reports on such meetings were sent to RKO headquarters. The subject of the meetings was discussed at staff conferences. In a year and a half, 382 contacts were made. KHJ–TV also furnished speakers for civic affairs, thus, allegedly, affording station personnel an opportunity to discuss with organization leaders the television needs and desires of their respective groups.

45. As noted in the biographical sketches above, key KHJ–TV personnel are associated with a number of civic organizations. Klein has lived in Los Angeles most of his life and has worked with many civic groups there. Wally Sherwin has lived in Los Angeles 20 years and is involved in youth activities. Allan Moll, as a newsman, is in regular contact with local political figures. With the public affairs director, he maintains contact with local civic groups. Mark Davidson, producer of the "Nine on the Line" show, reports regularly on program ideas picked up from community leaders and others. At KHJ–TV telephone and mail comments on programs are digested and sent to the General Manager and to the Program Department. From time to time when a new program is presented, public reaction is solicited from the audience.

46. This then is KHJ–TV's method of ascertaining community need. Assertedly, it grew out of a management meeting held at KHJ–TV in 1962 pursuant to a directive from national headquarters setting forth steps to follow in maintaining community liaison. A staff member was assigned the task of compiling community activities in which the KHJ–TV staff was involved. All RKO personnel were alerted to a corporate policy of paying dues and fees involved in civic participation. A Speakers Bureau was discussed at the meeting and a list of the ten most pressing local civic needs was compiled.

47. Also, in 1962 a committee on community needs was established with an RKO Division Manager for Radio and Television in Los Angeles, as Chairman. One of the members of the committee prepared a survey of the religious community in the area, and a status report of personnel activity in obtaining cooperation with religious groups was also prepared. A list was made of religious groups, together with names, addresses, and telephone numbers. The latter list was circulated among the program staff at KHJ–TV. Later a more detailed analysis of the religious composition of the area was made.

48. In 1963 a management meeting was held for KHJ–TV personnel at which discussion was held on procedures for handling listener reaction and staff-identified area needs. Thereafter KHJ–TV personnel submitted, from time to time, reports on area needs. These reports were exchanged between standard broadcast personnel and television personnel.

49. Advanced as an example of RKO's community-service policy in action is the following incident: In January 1963, Malcolm Klein had lunch with the television chairman of a forthcoming Brotherhood Week observance. After lunch, Klein told station personnel about the event and told officials of a sponsoring organization of people at KHJ–TV who should receive news releases on the event. Klein also called to the attention of an RKO executive that a seminar was being held on police and community relations. As an outgrowth of this advice the RKO executive attended the seminar. Thereafter, the executive circulated to RKO program personnel a recommendation that a program should be put on the air relating to racial problems. In the meantime, Klein was advocating by way of memorandum to his staff that a theme of racial tolerance should be a year-round project. Such activity as this culminated in four programs presented over KHJ–TV, once a month, called "Rearing Children of Goodwill".

50. In 1963 KHJ–TV commissioned a college professor to do a mongraph on racial problems in the Los Angeles Area. In the Fall of 1964 KHJ–TV paid Frank N. Magid Associates $10,000 to survey and prepare a report on the programming opinions of the Los Angeles viewing audience (of which more later). Program audience rating services have also been employed by the station.

51. About ten years ago, a consensus of conglomerate opinion concluded that there was a need for quality motion pictures—especially sophisticated adult films in television prime time. Since that decision, other Los Angeles television stations have been telecasting movies. General Tire and Rubber, RKO and KHJ–TV have, since then, been exploring other sources of television programming.

ON THE AIR OPERATION—SOME FAVORABLE ASPECTS OF KHJ–TV'S PROGRAMMING

Promise vs. Performance

52. During the composite week for the license period December 1, 1962 to November 30, 1965, an analysis of KHJ–TV program logs submitted with its renewal application shows that the station broadcast the following types of programs in the following amounts:

	Percent
Entertainment (including special language programming)	86.5
Religious	1.5
Agricultural	.375
Educational	3.75
News	3.375
Discussion	1.5
Talks	3.0

The application filed by KHJ–TV for the renewal period covered in the table above predicted the following:

	Percent
Entertainment	89.6
Religious	1.1
Agricultural	.4
Educational	2.0
News	2.9
Discussion	1.0
Talks	1.8
Special language	1.2

Programming

53. In the next 32 paragraphs are set forth some of KHJ–TV's programs that lay particular claim to serving the public interest. In making its program showing KHJ–TV was not limited to any particular period of time. It will be recalled that the station was acquired by General Tire in 1951. As will be shown later, the station's broadcast day lasts all the way from 16 to 22 hours. Thus, in reading the following paragraphs it might be well to bear in mind that the programs described are extracts from some 100,000 hours of air-time utilization. It will be noted that frequently descriptions of programs or program series are unattended by facts on duration of programs and/or program series. To have excluded programs from findings because of this failure would have been unfair to KHJ–TV. The record leaves no room for doubt that many programs and program series whose duration is shrouded in mystery in the record were in fact broadcast. Accordingly, it is unsafe to make assumptions of time span occupied by these programs unless length or duration is specified. It might also be well to remember that even when program length is specified, the inference does not lie that the time period was fully occupied by program material. There is no evidence in the record that KHJ–TV abjured the common station practice of honeycombing program material with spot announcements. There is, similarly, no evidence that in the presentation of motion pictures it failed to eviscerate them and replace unused parts with commercial continuity. As will be seen later, KHJ–TV had lots of commercial spot announcements to locate amid its programming.

104–019—74——11

Entertainment

54. In the entertainment category, as has already been noted, a staple of KHJ–TV's programming has been the presentation of movies. Some of these claim excellence. Richard III was presented with attendant happenings in celebration of Shakespeare's birthday. A movie series entitled "Cinema IX" included: The Sky Above, The Mud Below; A Taste of Honey; This Sporting Life; Waltz of the Toreadors; Divorce Italian Style; Billy Budd; Two Women; School for Scoundrels; Black Orpheus; David and Lisa; Ballad of a Soldier; The Entertainer; Room at the Top; My Uncle; and Les Miserables. For about a year and a half on each Saturday morning a Spanish language film was aired. A series of plays produced by the British Broadcasting Corporation was carried which included: Julius Caesar; The Rivals; Anna Karenina; Antigone (Anouilh's); Wuthering Heights; Midsummer Night's Dream; and She Stoops to Conquer. A series called "Play of the Week" included: The Iceman Cometh; World of Sholom Aleichem; Rashomon; Waiting for Godot; Lullaby; The Dybbuk; and Burning Bright. A series, "Spread of the Eagle," another BBC production carried by the station, included adaptations of the Roman plays of Shakespeare.

55. KHJ–TV has presented some concerts and operas. In connection with the following programs, the station went to great lengths in the expenditure of time, effort, and money to carry the programs on tape and in a technically excellent fashion: *Promenade Concert*—a two-hour concert by the Hollywood Bowl Symphony Orchestra under the direction of Arthur Fiedler and featuring the "Chanteurs de Paris"; *An Evening at the Hollywood Bowl*—Andre Kostelanetz conducting the Hollywood Bowl Symphony Orchestra in an All-Gershwin Night featuring pianist Earl Wild; *An Evening of Opera*—a two-hour Hollywood Bowl concert featuring Maurice Abravanel, director of the Utah Symphony Orchestra, and Jan Peerce and Mary Costa, vocalists; *Hollywood Bowl Concert—1965*—a 90-minute program again featuring Andre Kostelanetz leading the Bowl orchestra in an evening of Gershwin Music, with singers Martina Arroyo and Robert McFerrin and pianist Lorin Hollander.

56. KHJ–TV also aired filmed versions of Verdi's "La Traviata," "Rigoletto," and Puccini's "Tosca"; "An Evening with Theodore Bikel," a taped concert of folk music; and a filmed production of the Red Army Singers and Dancers. On a Symphony Orchestra Telecast Benefit, KHJ–TV carried an hour-long concert by the Los Angeles Symphony Orchestra. The Orchestra was conducted by Zubin Mehta and featured Jack Benny.

57. KHJ–TV has also telecast programs in the field of art. At an exhibit of Mexican Art at the Los Angeles Museum, KHJ–TV produced a program on which Vincent Price was featured. The station also produced a program featuring an artist named Leon Saulter. Twice the station carried programs showing the paintings of Harry Lackman. The opening of the UCLA Art Center was signalized by KHJ–TV through a showing of a Matisse exhibit. The "Art and the Dance" was filmed in color by KHJ–TV in an art gallery and presented over its facilities in an effort to show art and dance in single

form. A film on the life of Michelangelo was presented, as well as a film on the travels of the Pieta. "Paintings in the White House," narrated by Fredric March, was also carried at KHJ–TV.

58. Popular music and "personalities" were aired by KHJ–TV. "Cheerio A-Go-Go" was filmed in London especially for the station. The series included ten top English recording acts including the Beatles, The Rolling Stones, and Herman's Hermits. A montage tour of London night life was also included. The production of this series involved an unusual expenditure of money, time, effort and personnel on the part of the station. A program series entitled "Hollywood A-Go-Go" appears to have been a result of the foregoing programs. These latter programs were one hour in length and pioneered teenage discothèque-type television programming. They were carried over KHJ–TV and were later syndicated. "Aloha A-Go-Go," a one-hour program, was filmed in Hawaii. A series of remote programs was presented from the Hollywood Palladium and Moulin Rouge. Top recording stars, Miss Teen USA, and 20 different "bands" were featured. Also presented were "Darin at the Grove," an hour-long program from the Ambassador Hotel in Los Angeles, and "A Salute to Eddie Condon." For a year and a half the station broadcast a live program called "Ninth Street West." This program presented local entertainment groups plus headline guests. It was designed to appeal to teenagers and young adults and included an audience participation feature.

59. For four years ending in 1964, KHJ–TV annually carried highlights of the Tournament of Roses Parade. A Flag Day Parade was also carried, as was a Christmas Parade. A sneak preview of the "World Travel Show" was carried. A 90-minute color travelogue film called "Flight of the Magellan" was presented. Those attending a movie preview of "Those Magnificent Men in Their Flying Machines" were aired on KHJ–TV. A half-hour coverage of the premiere of "Lord Jim" was presented from a theatre lobby and coverage was given to behind the scenes activity in connection with making that movie. One hour coverage was given an antique auto show.

60. In 1964 KHJ–TV broadcast a 19-hour continuous program on behalf of the Cerebral Palsy Foundation. The program featured Hollywood celebrities and reception centers set up in nearby communities for the receipt of donations. A similar program was carried in 1965. Since 1960 KHJ–TV has carried live, and exclusively, the Miss California Beauty Pageant.

Children's Programs

61. In the field of children's programs, KHJ–TV has broadcast programs both morning and afternoon. Much of this programming has been cartoons and animated subjects with a master of ceremonies urging children to develop such beneficial traits as sound health habits. KHJ–TV also presented motion pictures of especial interest to children. David Copperfield, Oliver Twist, King of the Khyber Rifles, Gunga Din, Kidnapped, A Christmas Carol, The Prince and the Pauper, Gulliver's Travels and Call of the Wild were presented. A two-part film of the Moscow State Circus was shown as was a series of Shirley Temple films.

Public Affairs

62. Beginning in September 1964, KHJ–TV carried a live, one-hour afternoon program entitled "Nine On The Line". This program featured station personnel as well as guests, and at times telephone calls from viewers. On the program a variety of subjects was discussed including: Los Angeles racial tensions, social maladjustments and mental illness, California's local housing referendum, problems of public schools, police review boards, politics, nuclear war, alcoholism, unethical business practices, and activities of the Los Angeles Zoo. Each week the most interesting program was edited and broadcast for one-half hour at night.

63. KHJ–TV has regularly carried Presidential messages and news conferences. Such events as the Kennedy assassination were covered by the station using RKO's own staff. The station has also carried a Los Angeles Mayor's speech to the City Council and the annual message of the Superintendent of Schools. The station carried frequent reports on the Republican Presidential Primary of 1964. Many hours of remote coverage were given the Republican Presidential Convention in that year. Goodwin Knight and Mort Sahl covered the Convention for the station. "Politics—'64," featuring Samuel Lubell, produced by RKO, was a series carried on KHJ–TV in connection with the 1964 Republican Campaign.

64. In December 1962, KHJ–TV began a series of half-hour monthly programs on Sunday afternoon entitled "Project Today," directed at cities within the station's coverage area. Public officials were featured. In 1963 a station newsman was featured in 18 half-hour reports on his travels through the Western Hemisphere. From 1963–65, a series entitled "In Search of a Solution" was carried. The RKO-produced series featured 25 minute-and-a-half to five-minute interviews with various persons on Civil Rights (1963), Presidential Succession (1964) and Communist China (1965). "Viewpoint Washington" was carried from June 1964 to October 1964. An RKO Washington News Bureau production, this program was broadcast weekly for 21 weeks featuring a panel discussion utilizing members of the Washington press corps. "Ladies of the Press" was a weekly 30-minute program running for 35 weeks produced by the RKO News Bureau, consisting of a panel of women journalists interviewing prominent personalities in the news. A "New Year's Special News Roundup" ran for an hour on January 1, 1964, and "Year Past—Year Ahead" ran for the same duration on the last day of the year. Both programs were panel discussions.

65. In March 1965, KHJ–TV expended much time, effort and money in presenting a two-hour program covering the Los Angeles County Museum of Art. Similarly in 1964 KHJ–TV carried one and a half hour coverage of the dedication of the Los Angeles Music Center. KHJ–TV also aired, in connection with the dedication of the Memorial Activities Building at the University of California at Los Angeles, a special program showing details of the building. In 1963 the station broadcast the Diamond Jubilee Banquet of the Los Angeles Chamber of Commerce, and in 1964 broadcast the Orange County Show celebrating the county's similar anniversary. Students from the county participated in the production of the program. In 1964

KHJ–TV broadcast two specially produced half-hour programs, one on the subject "Do I Step In and Intervene or Do I Mind My Own Business?"; the other reporting student sit-ins at the University of California. "Joe Dolan's World of People," featuring interviews with prominent people, was carried from January 1963 to April 1964. At first it was carried weekdays for a half hour, later it was cut back to a monthly basis and finally, intermittently, for 15 minutes. "Now Listen Lady," a live discussion program on women's affairs, was carried for 15 minutes once a week from May to September 1963. In 1965, Dr. Linus Pauling was on the station for a full hour on a program reporting on a "Pacem in Terris" conference he had attended. In the spring of 1964, a discussion program featuring a local commentator was carried by KHJ–TV daily at midnight for a half hour. In October 1963, the station carried a one-half hour interview program with Madame Nhu. In 1965, a half hour documentary was carried on the State of Israel. A similar program was broadcast in the same year on the fight for freedom in captive nations. The "Sam Yorty Show," a 90-minute discussion series featuring the Mayor of Los Angeles was carried. In 1965, the station broadcast a two-part documentary on the work of the Los Angeles County Attorney's Office. After December 1966 the station telecast a weekly series called "Dateline Campus." The program was produced by a teachers' association and a college.

66. Throughout the license period, KHJ–TV carried interviews of five minutes duration on public affairs between interludes of movies. A number of representatives of civic groups were interviewed in this way. The station carried Theodore Granik's "Youth Wants to Know" program, and David Susskind's "Open End." The former program was a half hour in duration; the latter an hour. KHJ–TV also carried RKO's produced series "Firing Line with William F. Buckley, Jr.", a one-hour discussion program with Buckley interviewing figures in the news. The "Al Capp Show," a weekly one hour documentary, was also carried.

67. In April 1965, KHJ–TV broadcast a half hour program "The Growing Crisis", presenting a controversy over the use of Mexican labor. In 1964, the station carried nine one-hour and three half-hour programs on a "Living Camera" series. These shows covered such subjects as gridiron rivalry, capital punishment, rehabilitation of juvenile groups, retirement problems of air line pilots and a study of a Moslem leader. Also in 1965, KHJ–TV broadcast programs on "Crime and The Student" and "Inhale—Exhale" (on glue sniffing). In July 1965, the station carried 12 half-hour CBS network programs entitled "You Are There," a historical series.

68. KHJ–TV carried a series of interviews with the Director of the Los Angeles Zoo who appeared on the program with animals. It also carried a station-produced program called "How the Southland Plays," a tour of Southern California resorts including Disneyland and the Los Angeles Zoo.

69. "The Truth About Communism," featuring Ronald Reagan, was presented in 1963, and in 1964 the station carried a filmed documentary dealing with the paralysis of freedom of personal choice and

the extremes to which conformity is carried out. In 1963, 1964 and 1965 the station presented 20 hour-long filmed programs entitled "Perspective on Greatness" portraying the lives of famous individuals and historical events. A one-hour filmed program called "Operation Moonshot" was aired twice in 1964. A half-hour program entitled "Your Heart and Mine", produced in conjunction with the American Heart Association, was aired by the station. The production highlighted findings presented at the Association's annual meeting.

News

70. KHJ–TV carried some news programs, largely on an irregular basis. Length and frequency varied. A typical day's schedule showed news capsules in the morning and early afternoon, a 5-minute newscast in mid-afternoon, a 15-minute newscast in the evening, and closing news at the end of the day. All news was edited.

71. The station used AM and FM as well as TV personnel on news. Newscasts normally originated in the newsroom but a camera was set up for bulletin stories on short notice. News programs included news-sound-on-film, silent-film, video-tape, and still-shots. Live shortwave reports were also presented over slides or with an on-camera reporter using earphones. This latter technique was sometimes employed in reporting news furnished by other RKO stations or other stations cooperating with RKO.

72. Members of the KHJ–TV news crew regularly covered the Mayor's and the County Board's meetings. Excerpts from "Nine on the Line" and other such excerpts were utilized on its evening newscast. These newscasts have covered special reports on problems such as smog. Information on persons wanted by the FBI and local law enforcement agencies was also regularly broadcast near the close of the day on KHJ–TV.

Special Events

73. KHJ–TV has aired important local events shortly after the events and in doing so preempted regularly scheduled programming. Coverage of the Watts riots were given live, as well as on film. Shortwave radio and three remote units were employed. Similar coverage was given a dam disaster, forest fires, and a major fire in a movie studio. KHJ–TV employs news "stringers" as sources of local news.

74. The KHJ–TV newsroom has three national and one regional press service and radio monitors covering dispatches of police and fire departments and of the sheriff's office. KHJ–TV News has one mobile unit and shares two others with KHJ-radio. A survey made by a news service showed that in 1966, except for NBC and CBS owned-and-operated stations, KHJ–TV carried more locally produced news than any other station in the market.

Sports

75. During 1963, KHJ–TV aired 26 Los Angeles Angels baseball games, the third year of such coverage. During 1963–64, KHJ–TV aired 12 Los Angeles Lakers basketball games. During the same season, five National Hockey League games of the Chicago Black-

hawks were telecast. When KHJ–TV lost the contract for major league baseball and basketball, it turned to golf and other sports. In 1963, it carried the Frank Sinatra Golf Tournament at Palm Springs and in the same year presented a 90-minute film of golfing instruction featuring leading professionals. In 1964 it carried the San Diego Open. In 1965, it carried the Phoenix, Houston, and Greensboro Open tournaments, the PGA Open (three matches), the New Orleans PGA, the PGA Million Dollar Golf (two matches). The Haig and Haig Tournament was produced in that year by KHJ–TV. In 1964, KHJ–TV also presented a 45-minute film for Little Leaguers. In 1965 it carried "The Old Ball Game," a filmed, one-hour, specially commissioned broadcast commemorating the opening of the baseball season. During its last license period, the station carried six hours of special tapes made at the Little World Series in Williamsport, Pennsylvania.

76. In 1963, KHJ–TV carried coverage of the West Coast surfing finals. In 1964, it telecast the Malibu Surf Riding Championship. In May 1965, it carried filmed coverage of a surfing championship competition in Hawaii. The following month, it carried "Strange New Breed," a documentary film on surfing. Also in June it carried 90-minute coverage of a surfing competition at Hermosa Beach.

77. KHJ–TV has carried a number of Los Angeles high school championship games in baseball, basketball, track and football. It carried two-hour coverage of the 1963 California Inter-Scholastic Federation Swimming Championships. In 1964 it gave one and a half hours to the same subject. A 75-minute telecast of the 1963 finals of the Los Angeles AAU Swim Meet was carried. KHJ–TV carried four Whittier College football games in 1964. In October of that year it carried "Olympiad 1964," a preview of the Olympics. "Roaring Wheels," a series of four films on automobile racing, was carried during May 1965. Highlights of the 39th Annual West Coast Relays were filmed and telecast in 1965. Filmed highlights were also shown of the U.S.-Soviet Union track meet. The 1964 NCAA Ski Championships were also carried.

Education

78. During the license period, KHJ–TV broadcast five days a week a series of half-hour instructional programs entitled "Spectrum." Sometimes these programs were repeated late at night. The programs were originally produced by Los Angeles State College and later by Los Angeles school systems. The program subjects ranged from the banking system and international economics to nursing and photography. As an additional part of the "Spectrum" series, the following half-hour programming was also presented during the summer of 1963: "The Seminar on American Civilization"; "Searchlight on Delinquency"; "Books and Ideas"; "Parents and Dr. Spock."

79. The station also carried a series of programs produced by Los Angeles State College called "Concourse." Featuring a woman professor, the program sought to examine the concourse of books, youth and ideas. A series of French conversation programs entitled "En France" was also carried. This program was produced in cooperation

with Hofstra College. A one-hour documentary film entitled "Invitation from Sam" was produced by the station in cooperation with the city school system. The program showed the numerous recreational activities available to young people in the area.

Agriculture

80. Each Saturday morning during the license period, KHJ–TV carried a regular weekly half-hour series of filmed programs addressed to agriculture. The programs were produced and furnished by the U.S. Department of Agriculture and were entitled "From the Ground Up."

Religion

81. During 1965, KHJ–TV carried four half-hour broadcasts entitled "Rearing Children of Good Will" produced in cooperation with the National Conference of Christians and Jews. The program featured a number of prominent local civic figures. Also in 1965, KHJ–TV carried "Insight," seven and a half hours of taped dramas produced by a Paulist Father. Prominent Hollywood actors and writers contributed to the program. KHJ–TV has, since May 1963, carried "The Hour of St. Francis," a series of recorded dramas, produced by the Order of St. Francis. Prior to May 1963, the station carried a weekly half-hour religious program entitled "Way of Faith." Beginning in April 1965, it carried a half-hour Sunday series featuring sermons by Dr. Norman Vincent Peale, a program distributed by the Foundation for Christian Living.

82. In 1962, 1963 and 1964, KHJ–TV carried for one hour live coverage of the Christmas Eve services from a local Episcopal Church. On the same day in 1963, it carried a half-hour live program covering a local college Christmas Pageant. On the Sunday preceding and following Christmas, the sermon of a local minister was carried. For Easter in 1963 and 1964, services were carried from a local Episcopal Church. In 1965, the station carried the Los Angeles Choir singing Brahms Requiem Mass from a local Presbyterian Church. Art work was also shown on this program. Bing Crosby narrated a film for Christmas Eve presentation produced by a Catholic priest and taped by KHJ–TV. The film was carried by all RKO stations including KHJ–TV. During a Christmas season, the station carried Art Linkletter's travels through the Holy Land with music produced by the Westminster Choir in a program entitled "Christmas in The Holy Land."

83. In 1964, KHJ–TV, for the second year, gave 30-minute coverage to a speech given by a Methodist Bishop at an Annual Bishop's Laymen Luncheon. The station regularly broadcasts short pre-recorded inspirational messages featuring local members of the clergy. These are presented at the beginning and end of each broadcast day.

Special Aspects of KHJ–TV Programming

84. A program series featuring works of art included a broadcast of a Picasso Exhibit at an Art Museum. This was presented in prime evening time. It helped promote a large exhibit of Picasso graphic work. The station promoted the sale of Picasso prints and $10,000 was

thus realized. The money was turned over to the Art Museum. Later the works of another Spanish artist were exhibited at the Museum, those of Fausta deLima. As already noted, a film of Marcel Marceau was broadcast. This was a one-hour program produced through the efforts of KHJ–TV. Recently, the film has been offered for syndication by "RKO Productions." KHJ–TV telecast twice in prime time a ballet program. KHJ–TV's manager, together with the prima ballerina, appeared on the program to encourage like cultural undertakings. During May 1967 KHJ–TV operated as a key station in the incipient, but eventually unsuccessful, network called "United" by carrying a program called "The Las Vegas Show." A series of 14 one-hour-per-week programs called "Therapy" was carried over KHJ–TV. The series was financed and produced by KHJ–TV and was presented over the station in prime time. The programs were produced under the supervision of qualified psychologists and psychoanalysts. On weekdays for about six weeks KHJ–TV carried, for 15 minutes, a speech correction program. The program originated with a local college, Pepperdine. The programs were also later carried on the local educational station.

85. The series "Dateline Campus," see paragraph 65 above, was aimed at showing the community the services performed by a state college system. "On the Scene," a one-hour documentary presented twice weekly during prime time, was intended to cover community activities. "Boss City," the weekly, live, teenage participation program, was designed to help bridge the generation gap. "Reporter at Large" featured during prime time excerpts, regarded as best, from the "Nine on the Line" program. The William Buckley program was produced by the station. KHJ–TV was the first area station to carry soccer games, the Los Angeles Toros, during their first season. An open-air amphitheatre operated by the City of Los Angeles has been promoted by the station through interviews with the director and featured performers.

Announcements of Civic, Charitable and Governmental Activities

86. Unpaid announcements on behalf of non-commercial interests were carried by the station. In 1964 and 1965, 4,937 and 9,453 such announcements were, respectively, broadcast. During July 18–20, 1963, the station urged the public not to look at the eclipse of the sun directly because of the possibility of eye injury.

Expenditures for Programs

87. KHJ–TV has made a considerable effort to gain a share of the Los Angeles television market. Its expenditures for station operation have increased from 9 or 9½% of the Los Angeles television stations' total for such expenditures during 1957–1962 to 13.1% of that total in 1963, 11.5% in 1964 and 12.2% in 1965. Program expenses have risen from 30% of total expenses in 1952 to 61% in 1965. Considerable sums of money have been spent by KHJ–TV on programming. In the past six years it has contracted for 20 million dollars worth of programming. Its feature film library cost $14 million. Some of its local programming has been expensive. Coverage of each Hollywood Bowl program has cost the station about $30,000. Cost of coverage of City

Council meetings and the Mayor's press conference has run in the neighborhood of $1500 to $2000 for each such broadcast.

Audience

88. Although KHJ–TV has succeeded in making no appreciable gain in winning audience during prime evening viewing hours, it has won some audience in the Los Angeles market after 5:00 P.M. as indicated by this table which covers audience trends for the period 1962–1966.

Time period	Los Angeles market	KHJ–TV
	Percent	*Percent*
5:00 p.m. to 7:30 p.m.	+38	+60
7:30 p.m. to 11:00 p.m.	+26	+25
11:00 p.m. to midnight	+24	+56

Favorable Reactions to KHJ–TV Operations

89. There are people in Los Angeles who speak favorably about KHJ–TV. In the indented material below their comments are summarized.

William Severns is the Chief Administrator of the Music Center in Los Angeles. He says KHJ–TV is "probably" the leading local station in popularizing and financing symphonic concerts in Southern California.

Talmadge L. Reed is Deputy Director of the Los Angeles County Museum of Art. He believes KHJ–TV is doing an excellent job in presenting art by means of television.

Eddie Albert is a movie actor and commercial television personality. He believes a great deal of expense, effort and concern is required to present such programs as KHJ–TV's coverage of the opening of the Art Museum. He participated in that program.

Dr. James Loper is Vice President of Community Television of Southern California, and General Manager of educational station KCET. He states that KHJ–TV has cooperated in the production of educational programs and has been friendly to KCET. KHJ–TV was the only Los Angeles station willing to provide free time for the "Spectrum" series. He believes such programs as "the arts" and "Hollywood Bowl" to be "unequalled." The station has assisted KCET with financial and other aid. He believes there is a place in the community for a station specializing in movies. He thought KHJ–TV's presentation of a news program during mid-evening hours a unique service.

Father Elwood Kieser is National Director of Radio and Television for the Paulist Fathers. He believes KHJ–TV's presentation of his program "Insight" in prime evening time, free, reflects a policy of community service and dedication. It was the first station in the country to make the presentation. He believes the station to be imaginative and to serve artistic, educational and cultural interests. It has a good reputation by reason of such programs as "Nine on the Line."

Louis Arnold Pike is Radio and Television Coordinator for the California Teachers Association, Southern Section. He believes KHJ–TV's "Spectrum" and "Dateline Campus" programs, which his organization helped produce and present, served needs in the area. Few schools are equipped to produce television programs and must depend on stations for such production. KHJ–TV at one time offered air time which could not be utilized by his association.

Arthur Knight is Professor of Cinema at U.S.C. He likes the mechanics of KHJ–TV's presentation of motion pictures. He found cultural merit in the station's film library. He thought pictures presented during the station's most recent license period "splendid." In the professor's opinion, release date of movies is of no significance. Many of KHJ–TV's old movies have been excellent. Psychiatrists and critics have divergent opinions on movies. He opposed government interference in television station programming.

Bruce Robertson was once with Broadcasting Magazine covering the activities of West Coast stations. In his experience KHJ–TV's coverage of the Hollywood Bowl and art programs has been unique. In his view the station has been imaginative in the use of motion pictures in a broadcast schedule.

Goodwin J. Knight is a former Governor of California. In his opinion, public affairs programs have been presented in a fair and impartial manner over KHJ–TV. He believes the station has an excellent reputation for serving the Los Angeles area public.

Joseph M. Quinn is Deputy Mayor of Los Angeles and Chairman, Los Angeles County and Cities Civil Defense Commission. He owns the City News Service. In his opinion KHJ–TV has carried programs on city government, aided civil defense, and has been fair and professional in covering news.

Inspector Edward Walker is Press Relations Officer for the Los Angeles Police Department. In his opinion KHJ–TV has been cooperative with the Police Department. He believes station representatives are interested in the community and law enforcement and that KHJ–TV has a good reputation in the community for responsible performance.

John J. O'Mara is Vice President of an advertising bureau. He believes KHJ–TV has a good reputation for serving viewers, community organizations and advertisers. It has acquired a unique identity as a motion picture station without program imbalance and without impairing other stations' acquiring special identity. In the Los Angeles market even "relatively" small advertisers can use television. In his view it would be a waste of spectrum space for a Los Angeles frequency to be assigned to Orange County.

Dennis F. Shanahan is an advertising agency executive. On the basis of his considerable experience in advertising, he has found KHJ–TV to have a good reputation, better than many stations, for responding to community program needs, interests and desires. The station's major strengths are mature movies, "lively

and reasonably literate" youth shows, "responsible" public affairs programs, good specials and responsible, imaginative people [staff] willing to become involved with advertisers. In his opinion such weaknesses as KHJ–TV has are generic to independent stations.

Dr. Wesley A. Young is Director of the Los Angeles Zoo. KHJ–TV has given him, and the Zoo, more air time than any television station except one where he appeared as paid talent.

Lawrence E. Houston is a Los Angeles school official. He noted that KHJ–TV has cooperated with the school system in presenting educational programs including "Spectrum," as well as some high school sports. There is considerable movement of school population in the Los Angeles area. In his opinion KHJ–TV's programs have served the entire area.

Awards

90. During 1963–66 KHJ–TV received the following awards or commendations. *Academy of Television Arts and Sciences* (Hollywood Chapter): 1964, "Emmy" for Hollywood Bowl telecast "Evening with Gershwin"; 1965, "Emmy" award for Hollywood Bowl telecast "Operatic Night"; 1966, "Emmy" award for "Gershwin Concert." *National Association for Better Broadcasting:* Best entertainment on regional television, 1963, for "An Evening with Gershwin" and BBC Drama Series; nominated KHJ–TV for Peabody Award for "Impressions" program. *Los Angeles City Council*, 1963: Passed resolution commending KHJ and KHJ–TV for presenting the Mayor and Council's review of the City. *Municipal Art Commission*, 1963: Special award for cultural contribution for program "Symphony Under The Stars." *Mayor Yorty*, 1964: Commendation for presentation of programs from Hollywood Bowl, Los Angeles Music Center and Los Angeles County Museum. In addition to the foregoing awards and commendations KHJ–TV lists approximately 44 more conventional citations from various groups, as well as numerous individual letters of commendation from civic leaders and viewers of the station in general.

SOME NOT SO FAVORABLE ASPECTS OF KHJ–TV'S PROGAMMING

Commercialization

91. Much of KHJ–TV's air time is devoted to the presentation of advertising. The station has no policy limiting the amount of advertising it will present. It does limit to 25% the amount of time it will carry commercial announcements during a half-hour period but permits the 25% to be averaged over a two-hour period. This allows, theoretically at least, 30-minute time segments to be devoted exclusively to purely commercial matter. In addition to program sponsorship, KHJ–TV sells 10, 20, 60, 90 second, and on occasion even longer, commercial spot announcements. About 60% of the station's total revenue comes from the sale of national advertising. That busines is handled by RKO's own national sales organization. During the 1965 composite week KHJ–TV reported presentation of 1132 commercial spot an-

nouncements. Its application for renewal estimates that its next renewal application would show 1430 such announcements.

92. For the 1965 composite week there were 117 14½-minute time segments during which two spot announcements were presented on KHJ–TV, 115 during which three were presented, 57 during which four were presented, and 52 during which five or more were presented. 88 spot announcements exceeded one minute in length.

Movies and Other Programming

93. The time between commercial announcements at KHJ–TV is, by and large, occupied by movies. Many of these are old, many are repeated and many feature crime.

94. Set forth below is the program schedule of KHJ–TV for the 1965 composite week. It is to be remembered that 1132 spot announcements of varying length were woven into the schedule.

Time	Title	Source [1]	Type
	SUNDAY, MAY 24, 1964		
a.m.			
7:59	Sign on.		
8:00	Sunday Big Babysitter (The Winner)	RC	Ent
9:00	Sunday Theatre	RC	Ent
10:30	Ladies of the Press	RC	Talk
11:00	Our Miss Brooks (Boynton Play Acts)	RC	Ent
11:30	Million Dollar Movie (Man Who Knew Too Much)	RC	Ent
p.m.			
3:30	Colgate Sunday Matinee	RC	Ent
5:00	Family Theatre (Young At Heart)	RC	Ent
6:30	Maverick (Greenbacks Unlimited)	RC	Ent
7:30	Theatre Nine (Gorgo)	RC	Ent
9:15	Theatre Nine News	LC	News
9:30	People Are Funny	RC	Ent
10:30	Encore (Indian Fighter)	RC	Ent
12:15	Sign off.		
	MONDAY, FEB. 17, 1964		
a.m.			
7:38	Sign on.		
7:39	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Babysitter (continued)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: Down Three Dark Streets)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/Louisiana State College (Latin America: The Conquest)	RS	Ed
p.m.			
12:00	News Headlines	LS	News
12:01	Searchlite/Delinquency (Eastern Wisdom)	RS	Dis
12:30	News Headlines	LS	News
12:31	Mr. District Attorney	RC	Ent
1:00	Cartoonsville	RC	Ent
1:45	Feature Page	LC	News

See footnote at end of table.

MONDAY, FEB. 17, 1964 (continued)

Time	Title	Source [1]	Type
2:00	Million Dollar Matinee (Film: Born to Kill)	RC	Ent
2:01	Interview Sid Goldman (10 min.)	LS	Talk
3:38	Interview Dr. Norman V. Peale (8 min.)	LS	Talk
3:46	Interview Elizabeth Scott (4 min.)	LS	Talk
3:50	Matinee News	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	The Bowery Boys (Paris Playboy)	RC	Ent
7:00	People Are Funny	RC	Ent
7:30	Dobie Gillis (Wedding Bell Toll)	RC	Ent
8:00	Million Dollar Movie (Film) (The Codlitz Story)	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Film: Bright Leaf)	RC	Ent
a.m.			
12:03	Clete Roberts News	LC	News
12:19	The Second Show (Film: Down Three Dark Streets)	RC	Ent
1:49	Spectrum (Latin America: The Conquest)	RS	Ed
2:17	Suspects Wanted	LS	News
2:19	Devotional	LS	Rel
2:25	Sign off.		

TUESDAY, APR. 7, 1964

a.m.			
7:38	Sign on.		
7:39	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (Film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Baby Sitter (continued)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: Young Stranger)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/La State College (Home Nursing, Health Career Opportunities)	RS	Ed
p.m.			
12:00	News Headlines	LS	News
12:01	All America Wants to Know (Bomber Nobody Can Stop)	RS	Dis
12:30	News Headlines	LS	News
12:31	The First Show (Film: Mr. Blandings Dream House)	RC	Ent
2:00	Million Dollar Matinee (Film)	RC	Ent
2:12	Interview Jack E. Leonard (10 min.)	LS	Talk
3:37	Interview Candy Johnson (6 min.)	LS	Talk
3:43	In Search of a Solution (2 min.)	RS	Talk
3:45	Feature Page	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	Sugarfoot	RC	Ent
7:00	People Are Funny	RC	Ent
7:30	The Deputy (Chain of Action)	RC	Ent
8:00	Million Dollar Movie (Film: Last Outpost)	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Film: Gun Crazy)	RC	Ent
11:46	Clete Roberts News	LC	News
a.m.			
12:00	Michael Jackson	LC	Talk
12:28	The Second Show (Film: Young Stranger)	RC	Ent
2:00	Spectrum/La State College (Home Nursing, Health Career Opportunities)	RS	Ed
2:30	Suspects Wanted	LS	News
2:32	Devotional	LS	Rel
2:37	Sign off.		

WEDNESDAY, MARCH 11, 1964

a.m.			
7:39	Sign on.		
7:40	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Babysitter (Film)	RC	Ent
9:00	King and Odie	RC	Ent

See footnote at end of table.

WEDNESDAY, MARCH 11, 1964 (continued)

Time	Title	Source [1]	Type
9:15	Big Babysitter (continued)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: Adventures of Capt. Fabian)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/Louisiana State College (Latin America: WW II)	RS	Ed
p.m.			
12:00	News Headlines	LS	News
12:01	Community of Condemned	RS	Dis
12:30	News Headlines	LS	News
12:31	The First Show (Film: Annie Oakley)	RC	Ent
2:00	Million Dollar Matinee (Film) (Edge of Darkness)	RC	Ent
2:01	Interview Dr. William Bryan (9 min.)	LS	Talk
3:37	Interview Allan Jones (7 min.)	LS	Talk
3:45	Feature Page	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	Follow the Sun (Inhuman Equation)	RC	Ent
7:00	People Are Funny	RC	Ent
7:30	Dobie Gillis (3 mil. Coins in the Fountain)	RC	Ent
8:00	Million Dollar Movie (Film: Boy On A Dolphin)	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Film: Love in the Afternoon)	RC	Ent
a.m.			
12:04	Clete Roberts News	LC	News
12:20	The Second Show (Film: Adventures of Capt. Fabian)	RC	Ent
1:46	Spectrum (Latin America: WW II)	RS	Ed
2:16	Suspects Wanted	LS	News
2:17	Devotional	LS	Rel
2:21	Sign off.		

THURSDAY, OCTOBER 17, 1963

a.m.			
7:39	Sign on.		
7:40	Devotional	LS	Rel
7:45	The Big Babysitter	RC	Ent
9:00	King and Odie	RC	Ent
9:15	The Big Babysitter (continued)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Berlin Express)	RC	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Art of Theatre)	RS	Ed
p.m.			
12:00	News Headlines	LS	News
12:01	Books and Ideas	RS	Dis
12:30	News Headlines	LS	News
12:31	Mr. District Attorney	RC	Ent
1:00	Cartoonsville	RC	Ent
1:45	Feature Page	LC	News
1:48	Interview Johnny Green (7 min.)	LS	Talk
2:00	Million Dollar Matinee	RC	Ent
2:01	Interview Roland Rath (5 min.)	LS	Talk
3:34	Herb Allen (6 min.)	LS	Talk
3:40	Late Afternoon News	RC	News
3:45	Mighty Hercules	RC	Ent
4:30	Engineer Bill	RC	Ent
5:30	The Funny Company	RC	Ent
6:00	The Lone Ranger (The School Story)	RC	Ent
6:30	Our Miss Brooks (Kritch Cove)	RC	Ent
7:00	People Are Funny	RC	Ent
7:30	Dobie Gillis (Taken to Cleaners)	RC	Ent
8:00	Million Dollar Movie (Fabulous World of Jules Verne)	RC	Ent
9:43	Special Featurette	LC	Ent
10:00	Clete Roberts News	LC	News
10:30	The Big Show	RC	Ent
a.m.			
12:00	The Second Show	RC	Ent
1:30	Spectrum (Art of Theatre)	RS	Ed
1:58	Suspects Wanted	RC	News
2:00	Devotional	LS	Rel
2:05	Sign off.		

See footnote at end of table.

FRIDAY, JUNE 5, 1964

Time	Title	Source [1]	Type
a.m.			
7:40	Sign on		
7:41	Devotional	LS	Rel
7:45	Cartoonsville	RC	Ent
8:00	Pancake Man	RC	Ent
8:30	The Big Baby Sitter (Film)	RC	Ent
9:00	King and Odie	RC	Ent
9:15	Big Baby Sitter (continued)	RC	Ent
10:00	News Headlines	LS	News
10:01	The Coffee Break (Film: The First Yank Into Tokyo)	RL	Ent
11:30	News Headlines	LS	News
11:31	Spectrum/L.A. State College (Focus on America through Art)	RS	Ed
p.m.			
12:00	News Headlines	LS	News
12:01	Hour of St. Francis (The Terrible Gift)	RS	Rel
12:30	News Headlines	LS	News
12:31	The First Show (Film: The Judge Steps Out)	RC	Ent
2:00	Million Dollar Matinee (Film)	RC	Ent
2:01	Interview Frank Tallman (9 min.)	LS	Talk
3:39	Interview Francis H. Tuchnan (5 min.)	LS	Talk
3:45	Feature Page	LC	News
4:00	Mighty Hercules	RC	Ent
5:00	Engineer Bill	RC	Ent
6:00	Maverick (Hostage)	RC	Ent
7:00	Abbott and Costello (Bank Holdup)	RC	Ent
7:30	The Deputy (The Hidden Motive)	RC	Ent
8:00	Million Dollar Movie	RC	Ent
9:45	Clete Roberts News	LC	News
10:00	The Big Show (Fort Apache)	RC	Ent
11:49	Clete Roberts News	LC	News
a.m.			
12:07	Michael Jackson	LC	Talk
12:38	The Second Show (First Yank Into Tokyo)	RC	Ent
2:05	The Late Feature (Boy With Green Hair)	RC	Ent
3:27	Spectrum (Focus on America through Art)	RS	Ed
3:56	Suspects Wanted	LS	News
3:57	Devotional	LS	Rel
4:01	Sign off.		

SATURDAY, NOVEMBER 16, 1963

a.m.			
7:55	Sign on.		
7:55	Devotional	LS	Rel
8:00	From the Ground Up (Men, Women and Children)	RS	Ag
8:30	CineMexicano	RC	Ent
10:00	The Saturday Movie (Capt. Sirocco)	RL	Ent
11:30	I Led Three Lives	RC	Ent
p.m.			
12:00	Million Dollar Movie (The Ring)	RC	Ent
1:43	Frank Carroll News	LC	News
2:00	Action (Open Clip Action)	RC	Ent
3:18	Bush Country	RC	Ent
3:30	Championship Bowling	RC	Talk
4:30	Sugarfoot (Shepherd With Gun)	RC	Ent
5:30	Bowery Boys (In The Money)	RC	Ent
6:30	The Deputy (Marked For Bounty)	RC	Ent
7:00	Shirley Temple	RC	Ent
8:30	Sat. Night Special (Land of Pharoahs)	RL	Ent
10:30	The Big Show	RL	Ent
a.m.			
12:25	Impact (Passage West)	RC	Ent
1:55	Triple Feature (Death of A Scoundrel, Saints Double Trouble, and Stromboli)	RC	Ent
6:00	Devotional	LS	Rel
6:04	Sign off.		

[1] Legend.—For all practical purposes "R" means film or filmed (recorded); "C," commercial; "S," noncommercial (sustaining); "Rel," religion; "Ent," entertainment; "Dis," discussion; "Ed," educational; "Ag," agriculture; "L," live.

95. The amount of time devoted to syndicated or feature film presentations at KHJ–TV during the 1965 composite week is set forth in the table below:

	Hours	Minutes
Sunday, May 24, 1964:		
Film time	15	30
Total broadcast time	16	16
Monday, Feb. 17, 1964:		
Film time [1]	14	59
Total broadcast time	18	47
Tuesday, Apr. 7, 1964:		
Film time [1]	14	58
Total broadcast time	18	59
Wednesday, Mar. 11, 1964:		
Film time [1]	15	12
Total broadcast time	18	42
Thursday, Oct. 17, 1963:		
Film time [1]	15	17
Total broadcast time	18	26
Friday, June 5, 1964:		
Film time [1]	16	22
Total broadcast time	20	21
Saturday, Nov. 16, 1963:		
Film time	21	23
Total broadcast time	22	09
Summary:		
Film time	113	41
Total broadcast time	133	40

[1] Includes ½ of program time for cartoon shows which feature a live master of ceremonies.

96. Of the films presented by KHJ–TV during the composite week, as announced by the Los Angeles *Times*, 24 were released during the 1950's and 16 in the 1940's and 1930's.

97. With a single exception, the foregoing six paragraphs will serve to present a picture of how KHJ–TV, day-in day-out, and, in-the-overall, has utilized its air time. There is additional evidence in the record covering the station's programming during the week of August 10–16, 1962, the 1964 composite week, the week of October 17–23, 1965, the week of December 23–29, 1966, and the week March 31–April 16, 1967. No useful purpose would be served by findings on the additional data. Such a showing would make no appreciable difference in the image of KHJ–TV programming already developed, and would only elongate this perhaps already too long decision.

Crime and Violence

98. The one feature of KHJ–TV's programming that is not adequately covered thus far is the station's practice of presenting movies featuring crime and violence. As one for findings, the subject is not without difficulty. Besides ever recurrent First Amendment problems attendant upon examination of the substantive content of any radio or television programming, there are two schools of thought on the social desirability of television shows featuring crime and violence. One of these schools claims that a diet of such vicarious experiences is just what we all need, for it purges us of our innate criminal propensities. The other school simply views such programming as a college for criminal knowledge. Be that as it may, the record shows that KHJ–TV did show a lot of movies featuring crime and violence, and that an appreciable body of opinion out of the station's audience strongly protested this practice. While to the imaginative the tip of the iceberg under discussion may show through in the 1965 composite week findings made above, the subject warrants amplification and to cover it requires going outside the limits of the 1965 composite week.

99. In a report of the National Association for Better Radio and Television Broadcasting covering KHJ–TV's programming for the

104–019—74——12

week beginning August 10, 1962 (see paragraph 104, *infra*), the Association included a statistical table. The table reads in its entirety:

CRIME STATISTICS*

KHJ–TV's crime statistics for the week included:

Murders	181
"Justifiable" killings	55
Attempted murders	98
Kidnappings	8
Shootings (victims wounded)	19

Additionally there were many instances of extremely brutal beatings, and assorted cases of arson, robbery, false arrests, dynamiting, extortion, and attempted lynching.

*In fairness to the station, we must point out that the crime portrayal statistics reported here are probably substantially higher than they would be for other weeks of programing. *Million D Movie* ("Jamaica Run" and "Hell's Island"—nine showings between the two films) is not always crime in its story theme. Also, the "Baby Face Nelson" promos, which added heavily to the "murder" statistic can scarcely be typical of promos aired in other weeks.[3]

[3] "Promo"—promotional announcement, an announcement advertising a forthcoming feature.

100. Between July 1, 1963 and December 31, 1963, these movies were shown one or more times over KHJ–TV:

Title	Times shown	Dates of showing
Adventures of Capt. Fabian	2	8–12–63; 11–9–63.
All This and Heaven, Too	3	7–25–63; (2) 10–21–63.
Androcles and the Lion	2	7–20–63; 12–25–63.
Angel Face	2	11–18–63; 12–21–63.
Angels With Dirty Faces	3	7–24–63; 12–7–63; 12–2–63.
Anna	1	11–1–63.
Anna Karenina	1	7–24–63.
Anna Lucasta	1	8–10–63.
Armored Car Robbery	3	8–31a63; (2) 11–22–63.
Baby Face Nelson	1	7–27–63.
Bermuda Affair	9	(9) Week of 8–26–63.
Best of the Badmen	2	8–24–63; 11–25–63.
Big Sleep, The	1	7–31–63.
Big Wheel, The	1	10–26–63.
Blackbeard the Pirate	1	10–27–63.
Black Tuesday	1	9–10–63.
Born to be Bad	3	(2) 11–19–63; 12–21–63.
Born to Kill	3	7–21–63; 10–11–63; 12–28–63.
Bowery to Bagdad	1	12–28–63.
Bright Leaf	1	9–27–63.
Caught	1	11–17–63.
Come Fill the Cup	1	11–17–63.
Confidential Agent	1	9–23–63.
Damned Don't Cry	1	10–26–63.
Destination Murder	1	11–20–63.
Eighteen and Anxious	1	8–14–63.
Eve of St. Mark, The	1	10–30–63.
Female Jungle	2	11–20; 10–19.
Fighting Trouble	1	10–19–63.
Flesh and the Spur	3	(2) 8–20; 12–14.
Flight for Freedom	2	10–7–63.
Forbidden Island	1	10–31–63.
Forever Amber	1	11–23–63.
Fountainhead, The	1	10–11–63.
Gambling House	1	12–7–63.
Gangster, The	1	10–21–63.

Title	Times shown	Dates of showing
Gang-Busters	4	9-3-63; (2) 11-6-63; 12-7-63.
Ghost and Mrs. Muir, The	1	9-12-63.
Girl in Every Port, The	1	9-28-63.
Golden Mistress, The	1	10-3-63.
Gun Battle at Monterey	1	8-24-63.
Half Breed, The	2	8-19-63; 11-27-63.
Hell to Eternity	1	12-7-63.
Hells Island	2	(2) 10-30-63.
Herod the Great	1	7-20-63.
High Sierra	1	9-16-63.
Humoresque	1	8-28-63.
I, Mobster	1	7-13-63.
Impact	1	10-27-63.
Indian Fighter, The	9	(9) 10-28-63.
Johnny Apollo	2	8-28; 11-10-63.
Kiss Before Dying, A	1	7-21-63.
Land of the Pharoahs	1	10-16-63.
Left Handed Gun, The	1	11-24-63.
Letter from an Unknown Woman	1	11-30-63.
Look in Any Window	10	(9) week of 8-2-63; 11-25-63.
Las Vegas Story	2	(2) 11-21-63.
Love in the Afternoon	1	9-22-63.
Lure of the Sila	1	10-6-63.
Macao	2	7-3-63; 11-30-63.
Manhandled	3	8-18-63; (2) 11-12-63.
Monkey on My Back	1	9-17-63.
Montana Belle	3	8-21-63; (2) 11-27-63.
Moulin Rouge	1	10-19-63.
My Forbidden Past	11	(9) week of 12-2-63; 11-7-63; 12-[illegible]-63.
My Gun Is Quick	1	10-2-63.
Murder Without Tears	1	8-31-63.
New York Confidential	2	8-17-63; 11-1-63.
Night of the Hunter, The	2	10-2-63; 12-31-63.
Out of the Fog	2	(2) 9-27-63.
Outpost to Morocco	2	(2) 9-17-63.
Outrage	1	11-29-63.
Payment on Demand	1	7-26-63.
Private Affairs of Bel Ami, The	1	11-27-63.
Problem Girls	1	11-5-63.
Quicksand	2	12-6-63.
Quiet Gun, The	4	(2) 7-30-63; 10-26-63; 12-6-63.
Rancho Notorious	3	7-25-63; 8-23-63; 11-4-63.
Red River	1	11-28-63.
Return to Paradise	1	10-4-63.
99 River Street	2	(2) 9-26-63.
Road House	1	12-7-63.
13 Rue Madeline	3	(2) 8-9-63; 11-24-63.
Ruthless	1	12-7-63.
Star, The	1	11-1-63.
Susan Slept Here	2	9-5-63; 11-7-63.
They Won't Believe Me	1	12-26-63.
Things to Come	9	(9) week of 11-18-63.
Three Bad Sisters	1	9-6-63.
Three Husbands	1	7-15-63.
Three Sailors and a Girl	9	(9) week of 9-30-63.
Track of the Cat	1	9-24-63.
Tuttles of Tahiti	2	(2) 12-24-63.
Underground	2	(2) 9-3-63.
Valerie	1	7-6-63.
While the City Sleeps	2	9-8-63; 12-12-63.
Wuthering Heights	1	8-29-63.
Yes, My Darling Daughter	2	(2) 7-15-63.
Young Guns, The	1	11-18-63.

101. "Jack the Ripper" was televised eight times over KHJ-TV during the week of July 6, 1964. "Pretty Boy Floyd" was presented at 7:30 p.m. on Sunday, July 12, 1964. During the week of September 21, 1964, the "House of Wax" was presented five times at 7:30 p.m., at noon on Saturday, and at 11:30 a.m. and 1:30 p.m. on Sunday.

102. In a press release dated July 30, 1964, the National Association for Better Radio and Television announced that it had prepared a

report on crime programs on Los Angeles television stations which was available to the public at the headquarters of the organization. The report contained synopses of KHJ–TV's presentation of "Jack the Ripper" and "Pretty Boy Floyd." Those summaries read as follows:

"*JACK THE RIPPER*"—feature film televised eight times during the week beginning July 6 (Monday) by KHJ–TV, Channel 9, owned by RKO General, Inc.

Following the opening scenes which portray the stabbing to death of a girl in a dark corner of a London street, the station announcer says: "You are about to witness one of the most terrifying films ever produced."

The first murder (and others to follow) was committed by an unidentified sadist who first accosted the victim, choked her until almost unconscious, then stabbed her in the abdomen with a long-bladed knife or scalpel which he takes from his physician's black bag. The murder was portrayed with screams, gasping sounds, and moans. The camera in this scene of murder, as well as those which follow, holds close-up views of the at first terrified and then contorted face. The murder scene is long and drawn out. Close-up on knife blade after it is pulled from the girl's body.

Other incidents of violence, including the attempted mob murder (with a knife) of a young American detective, are followed by another brutal sadistic attack on a barmaid. The camera holds a close-up view of the face of the girl as she is choked and then stabbed (shown in silhouette) three times.

A surgeon of the "Mercy Hospital for Women" examines the body in the street. He plans to do a post-mortem and tells a group: "Let's get this thing out of the street" He laughs. There is further mob violence. In the morgue at the hospital the surgeon's description of the body is this: "Bruises on the neck. Deep-seated multiple abdominal incisions inflicted by someone who knew what he was doing. These wounds are not the savage slashings of a maniac. They are careful well-defined abdominal incisions that show a knowledge of anatomy and surgery."

There is a long attempted rape sequence in a private dining room of an unsavory nightclub. The girl escapes after having part of her dress torn off. She runs into the street, where the Ripper accosts her. She is murdered in the same manner as the previous victims. During the break for commercials the announcer says: "Brace yourself for more terrifying moments coming up."

A following sequence covers a mob attack on a mute who is suspected of being the Ripper. (This mute, apparently mentally retarded, is the assistant to the surgeon when he operates.)

Another girl is murdered—sound effects and camera close-ups as in the preceding murders.

We now discover the identity of the Ripper. He is the surgeon. He is searching for a girl named Mary Clark, a former prostitute whom he thinks is responsible for the suicide death of his son. He finds Mary Clark and traps her in her room. He murders her in a long, graphic murder scene. Close-up on her face as she is stabbed.

The Ripper murders a guard at the hospital. He stabs the unsuspecting guard. The police come upon the doctor as he is performing an autopsy in the morgue. He attempts to get away, and is trapped in an elevator shaft. The elevator descends slowly to crush his body at the bottom of the shaft. He screams, moans, and sweats as the elevator comes down on him. The camera shows the elevator floor. Blood bubbles up through the cracks in the floor as the Ripper is crushed beneath it.

SUMMATION: The picture shows in graphic picture and sound, the details of the murders of five young women. It shows two attempted murders by mob violence. It includes the brutal stabbing of the hospital guard, and the crushing to death of the villain. It portrays terror throughout, in settings which include low-type clubs, the hospital morgue, and dark alleys.

Each of the eight showings during the week were televised at times particularly available to children and youth. The evening telecasts began at eight p.m. The Saturday showing was at noon. The two Sunday telecasts covered the period between 11:30 a.m. and 3:30 p.m. The Saturday showing immediately followed a program specifically addressed to children.

NOTE.—The showings were followed by a one-minute filmed promotional "trailer" for the film *Pretty Boy Floyd*. This trailer illustrated the gang killing, by three men with machine guns, of four police officers and the criminal they were guarding.

"*PRETTY BOY FLOYD*"—feature film (one hour 45 minutes) presented Sunday, July 12, 1964, beginning at 7:30 p.m.

This is a film which allegedly depicts the life of the hoodlum killer, Pretty Boy Floyd. It is largely concerned with the graphic presentation of 13 brutal murders, two "justifiable" killings, a number of attempted murders, three robberies, and other incidents of extreme violence.

Near the opening of the picture the wife of a man Floyd has viciously beaten wants him (Floyd) to run off with her. She says: "Everybody knows about us. Why can't we blow this crummy town."

The wife says: "Mike's going to be gone a whole week." She gives Floyd $262 of Mike's (her husband's) and says: "Just kiss me, Pretty Boy."

Floyd murders a man who has killed his father by burning him to death in a barn in Oklahoma.

Floyd, after being sentenced from 12 to 15 years for his part in a bank robbery, escapes.

Floyd meets a new partner and a woman (Ma Parks) in Kansas City. Two swindlers who live in Ma Parks' boarding house, leaving their wives, as Ma Parks says: "to entertain themselves as best they can." When these two characters return they enlist their wives in a plot to turn Floyd over to the police to get the reward money. One of the wives tells Floyd. Floyd and his pal kidnap the two swindlers and execute them gangland style. The two wives run off with Floyd and his partner.

They murder a policeman in uniform. Floyd's pal is killed. Hiding out in Oklahoma, Floyd murders a sheriff who finds him. Floyd is wounded. Ma Parks and the wife of the man whom Floyd has murdered take care of him. The girl is pregnant (presumably Floyd is the father).

Ma Parks arranges the massacre of the police guarding a notorious criminal. After this incident in which three gangsters with machine guns murder four officers and their prisoner, gangsters come to Floyd's room (he and a girl are on the bed in his room) and take him off for a gangland trial. Floyd is freed. He flees to Oklahoma.

A woman, the wife of a farmer, helps Floyd. She tells him: "I don't want any money. You can give me a few minutes of relaxation."

Floyd is trapped by the police. He runs, is shot down in an open field, then gets up and staggers. He is shot some more, finally falls dead.

A good idea of the content of the "House of Wax" may be obtained from the editorial which appeared in "Better Radio and Television," see paragraph 111, *infra.*

Public Reaction

103. Not all of KHJ–TV's viewing audience finds the station attractive. In the fall of 1964, KHJ–TV, at a cost of $10,000, commissioned Frank N. Magid Associates, a research organization, to conduct an in-depth survey to determine the programming opinions of the Los Angeles viewing public toward television stations. The study is long, complex and much of it is devoted to subjects irrelevant here, but some facts are worthy of note. The study is based on analysis of a sampling of 796 Los Angeles residents. Distribution of those 796 persons was based on the variables age, sex, income and occupation. Conclusions were drawn from the survey in the areas of news, sports, entertainment, public interest and advertising. In brief, these were the conclusions of significance here:[4] *News (over-all coverage)*—less than 1% mentioned KHJ–TV while 34% mentioned the leading station in this category; *Sports*—although figures were given for other stations

[4] Not all 796 surveyed responded to all questions. The word "mentioned" as used above connotes responses received and found acceptable for statistical use by Magid. In reading the Magid assessment it might be noted that there are seven VHF commercial television stations in Los Angeles.

and the conclusion was drawn that no station projected a positive image, KHJ–TV was not mentioned; *Entertainment* ("*all around*")—KHJ–TV was mentioned by 3% while 26% mentioned the leading station in this category; *Entertainment* (*best movies*)—KHJ–TV was the leader in this category with mention by 19% ("KHJ's movie image is the most positive among viewers of middle socio-economic level and among the younger age group"); *Most contribution to community*—KHJ–TV not mentioned while 12% mentioned the leading station in this category; *Programs of an educational nature*—KHJ–TV mentioned by less than 1% while 17% mentioned the leading station in this category; *Most believable advertising*—KHJ–TV mentioned by 2% while 8% mentioned the leading station; *Channel viewers would want to remain on the air if all other stations ceased*—4% mentioned KHJ–TV while 28% mentioned the leading station in this category.

104. Reports have been prepared for the National Association for Better Radio and Television (NAFBRAT) on the programming of KHJ–TV. One of these includes a factual presentation of the programming of the station during the week beginning Friday, August 10, 1962, and is based primarily on monitoring the station. The report is 57 pages long and goes into much detail concerning various facets of KHJ–TV's programming during the week. On the basis of the data analyzed these evaluations were made:

1. The station depends primarily on old theatrical films (mostly re-runs) for its basic program content.
2. There appears to be reasonable doubt concerning the station's active protection of its audience against misleading advertising.
3. The station's news coverage is not sufficient to constitute a significant community service.
4. The station violates standards established by the broadcasting industry in regards to the time-per-hour and individual length of commercial spot announcements.
5. The station is failing to produce or originate (with the exception of sports programs) telecasts which represent a significant value to the community.
6. There is an unhealthful saturation of crime and violence in the station's entertainment programs.
7. There are significant deficiencies in the station's religious, discussion, and agricultural programs.

105. A similar report to the one above, by the same organization, based on a monitoring of the station for the week March 31–April 6, 1967, found these facts: The station was on air during hours ranging from a high on Sunday, April 2nd of 19 hours 16 minutes to a low on Monday, April 3rd of 15 hours 3 minutes. During the week *Theatrical Films* were presented 74 hours out of the 121½ hours the station was on the air. There were 46 showings of 35 different films. Seven films were presented twice, two presented three times, 32¼ hours were devoted to films over 20 years old. Children's programming carried by the station during the week was comprised of a Monday–Friday, five

minute, morning show entitled "Nature's Window"; a TV film rerun, "Timmie and Lassie" carried Monday through Friday at 5:00 PM; a TV film rerun, "Superman," Monday through Friday at 5:30 PM, and "Shrimpenstein," a live show carried Monday through Friday at 6:00 PM. *Religious* programs carried during the week consisted of "devotionals" ranging in length from two minutes to four minutes at sign-on and sign-off, taped, featuring local ministers, and three half hours of recorded religious programs. Other than the "devotionals" no religious program was carried on Sunday. In the field of *Agriculture* the station presented each morning, Monday through Friday, for ten minutes a program consisting for the most part of two short films distributed by the U.S. Department of Agriculture. *Educational* programming occupied 5½ hours during the week. Included was a 30-minute, Monday through Friday, program presented by the Los Angeles City Schools, a program of the California Teachers Association, and several half-hour films produced at the University of Michigan. *News*—16 programs were aired ranging in length from five minutes to 30 minutes and 13 "headline" reports of one to two minute duration were carried. Total time devoted to news was less than four hours. Fifteen hours and 30 minutes during the week were devoted to *Talk* programs. Of this time 5½ hours were devoted to *Sports*. At 2:30 PM Monday through Friday a live program was presented featuring interviews with experts in various fields of *Public Affairs*. These programs lasted from 50 to 60 minutes each day. On Sunday evening Mayor Yorty was featured in a 90-minute program of talks with various guests. On Thursday evening there was a rebroadcast of a debate on conservatism between William F. Buckley, Jr. and Mark Davidson. During the week another Buckley program was broadcast, as well as an hour-long show featuring Al Capp.

106. NAFBRAT also issued a survey report entitled "Crime on Television." The report surveyed crime programs televised by Los Angeles VHF stations during the week of June 21–27, 1964. A crime program was defined as a program in which commission of crime was a major theme. War pictures, some spy pictures in which crimes occurred and cartoon programs were excluded from the survey. NAFBRAT disclaimed condemnation of crime programs per se but stated that it vigorously opposed saturations of violence and constant presentations of incidents and motivations likely to induce anti-social behavior. The survey found that during the week June 21–27, 1964, Los Angeles television stations televised a total of 192 hours of crime programs, an increase of almost 20% over the amount the stations broadcast in June 1958. More than two-thirds of these programs were broadcast before 9:00 PM. KHJ–TV led all other stations with 42 hours devoted to such programs. The next highest stations carried crime programs 33½ hours.

107. On September 3, 1964, NAFBRAT wrote the FCC complaining of the telecasting by KHJ–TV of "Jack the Ripper" and "Pretty Boy Floyd."

108. On September 22, 1964, the United Church Women, Los Angeles Council, wrote NAFBRAT:

> I am enclosing copies of letters sent to the Federal Communications Commission and to the Program Director of KHJ–TV by the Los Angeles Council of

United Church Women, in support of your Association's complaint of September 3 against the showings of *Jack the Ripper* and *Pretty Boy Floyd*.

We hope that enough protests will be made so that eventually we will see a decrease in the amount of violence and horror shown on television.

109. On September 24, 1964, Lionel Van Deerlin, Member of Congress, wrote to KHJ–TV. The body of his letter reads as follows:

I have just received from an organization known as the National Association for Better Radio and Television an outline and summation of two pictures shown by your station several times during the week at hours when they were particularly available to children. The pictures were *Jack the Ripper* and *Pretty Boy Floyd*. I have also received a copy of a complaint issued by the National Association for Better Radio and Television to the Federal Communications Commission.

Speaking not only as a member of the Interstate and Foreign Commerce Committee, but as a father of six children, I consider it incredibly bad taste for your station to permit the televising of such films at any time, but particularly so at times when they are easily viewable by juveniles. I support wholeheartedly the complaint of the National Association for Better Radio and Television, and will do anything within my power to bring about a greater sense of responsibility to the public on the part of the management of stations such as yours.

110. On October 23, 1964, Congressman Van Deerlin wrote another letter to the station. The body of that letter reads as follows:

I appreciate the courtesy of your reply to my letter regarding the NAFBRAT complaint concerning films telecast by KHJ–TV. At the same time, I am somewhat appalled at the ingennousness of your reply and your apparent assumption of naivete on my part which would cause me to accept your explanation as having been made in all seriousness.

The crux of your explanation regarding the films is that since they dealt with violent subjects the subject matter should be expected to contain some violence. To a certain extent this is true, but a man in your position should know that there are acceptable and unacceptable ways of depicting violence. The film, *Jack the Ripper*, in particular, depicted acts of violence in an unacceptable manner. A description of the first murder is sufficient to explain what I mean:

> . . . an unidentified sadist . . . accosted the victim, choked her until almost unconscious, then stabbed her in the abdomen with a long-bladed knife. . . . The murder was portrayed with screams, gasping sounds, and moans. The camera in this scene of murder, as well as those which follow, holds close-up views of the at first terrified and then contorted face. The murder scene is long and drawn out. Close-up on knife blade after it is pulled from the girl's body.

You cannot believe yourself, or seriously be attempting to make me believe, that such details are necessary in the depiction of historical events. They are obviously inserted for pure shock value, and the attempt on your part to rationalize them as being merely a recital of factual events lacks validity. Such arguments are flimsy in the extreme and denote a somewhat astounding belief on your part that I and presumably other inquirers are lacking in intelligence.

You state that in your selection of programs you attempt to satisfy a diversity of tastes and interests. I am moved to wonder to what tastes and interests you are pandering in your telecasting of movies such as *Jack the Ripper*. In short, I find your explanation unacceptable.

111. In the fall issue (1964) of *Better Radio and Television* (formerly NAFBRAT Quarterly) an editorial appeared entitled, "Station Answer: 'House of Wax.'" The editorial reads as follows:

Seventeen days after the National Association for Better Radio and Television filed a complaint against the management of KHJ–TV for televising the sex-

murder film "Jack the Ripper" during daytime and early evening hours, the RKO-General Los Angeles station presented the first of eight showings of "House of Wax" within a seven-day period. Station management could not have devised a more effective expression of its attitude toward the NAFBRAT complaint to the Federal Communications Commission. The implication is loud and clear: KHJ–TV will continue to broadcast lurid, sadistic horror films during "children's hours."

There is no mistake here. There is no misjudgment of the broadcaster's attitude or intention. "House of Wax" is a viciously brutal film deliberately designed to frighten and horrify its audience. During the week beginning Monday, September 21 many thousands of children viewed this picture during its eight showings—five times at 7:30 p.m., at noon on Saturday, and at 11:30 a.m. and 1:30 p.m., on Sunday. KHJ–TV promoted the showings of "House of Wax" in newspaper display ads with this appeal: "The motion picture you have asked to see! NOW! CAN YOU TAKE IT?"

"House of Wax" is a story about a disfigured sculptor who stalks and murders his victims, processes their bodies in boiling wax, and places them in his horrors museum.

Early in the film minutely realistic life-size wax figures are destroyed in a prolonged fire sequence which shows close-ups on faces and bodies as the wax drips like flesh in the consuming heat. When the heroine of this epic in sadism discovers that one of the figures in the museum is actually the body of her murdered friend, the mad sculptor straps her in a coffin-like container below a vat of boiling wax, gives her a hypodermic injection, and whispers: "The end will come quickly, my love."

There is no mistake here . . . but there is something wrong. Exploitation of depraved tastes. Seven-thirty in the evening! Noon on Saturday! Sunday morning! Is RKO-General really qualified to use public domain Channel 9 within the public interest, convenience, and necessity?

F. O.

112. Organizations and Congressmen were not alone in taking a dim view of KHJ–TV's on-the-air operation. As shown in the following subparagraphs, individuals also voiced critical views.

Dr. Clifton E. Moore, Director of the Radio-TV Film Commission for the Southern California Council of Churches, is an ordained minister. In pertinent part he testified that: His organization represents 2,000 churches in Southern California. It assists in providing religious television programming for Los Angeles television stations. He contacted KHJ–TV concerning the presentation of live programs but was told KHJ–TV does not do live church services and does not have the facilities or manpower to do live programming. He does furnish KHJ–TV with a filmed program, "Bauman with the Bible," featuring a Washington, D.C., minister. He favors local stations presenting local religious leaders. A program broadcast in the past featuring a local minister received greater acceptance than "Bauman with the Bible." KHJ–TV's "Insight" program, a nationally distributed program, features a Catholic Priest and is sectarian in part. In his opinion the program would be of greater value if a local priest were featured. Dr. Moore frowns on the Easter and Christmas services presented on KHJ–TV because they are commercially sponsored. In his view one time presentations of sponsored religious programs are not in the public interest.

Dorothy Clayton McKenzie is an associate professor of English at California State College at Los Angeles and teaches literature for young people. She was instrumental in the production of the

program called "Concourse." The program was carried for some time over KHJ–TV but was abruptly terminated by the station. Mrs. McKenzie, on June 1, 1963, wrote the station the following letter:

> The misinformation which is being sent by your station to viewers who write you to ascertain why Concourse has been discontinued greatly disturbs me. I have had a number of calls from persons who, regretting the loss of the program, wrote to your station to learn the reason for its discontinuance. All were informed that I had taken ill and did not feel able to continue the series—you also had the temerity to add that you deeply regretted this unforeseen development.
>
> You well know that your statement is not true and that, since two tapes were already prepared and I had made adequate plans for the preparation of several more, my brief indisposition would not have canceled a single telecast. You also know that in my final telecast of May 5th I truthfully recounted the reason for cancelation, your insistance that the program be moved to Fridays at 12:00 or 12:30, half-hours during which most viewers interested in this type of program do not have free time. You made the decision, so it is difficult for me to understand your fabrication.
>
> Your lack of honesty has placed me in a most difficult situation, with viewers who write inquiring as to my health and with guests who had been invited for interviews which had to be cancelled due to the termination of the program. King Vidor had consented to be my next guest, and other distinguished personalities were awaiting word as to available time for tape preparation. I have explained the true situation to all of them; what will they think if they or their friends write your station and receive the fabricated explanation which you for some reason have invented?
>
> You made things difficult enough while we were participating in the program: the time was not premium, pre-emptions were made with little or no notice, mistakes were made in the order in which the tapes were run without apology and not once did you find time or disposition to make a single comment to me, written or by telephone, good or bad, concerning the program. Now that you have found that public service offerings can be disposed of by relegating them to a time during which few people who are interested in such programs have free time for viewing, thus serving the dual purpose of making it possible for you to sell all of your weekend time and discouraging public service programs which appeal to a significant number of your viewers, do you think it is fair to inform questioners (I quote from your Mr. Sherwin's letter): "We are very happy to have had the pleasure of carrying this program, and if it becomes available at some time in the future, we would make every effort to reschedule it."? (The same double talk has been incorporated into a form letter, so apparently you have had enough inquiries to make individual response uneconomical).
>
> The misinformation which you are dispersing is most discouraging to those of us who are willing to work in the media and are thick-skinned enough to endure the affronts which apparently are the lot of public service programs. Now that you have brought our venture to what you no doubt consider a successful conclusion, do you agree that common courtesy to me and to the College staff demands that you state the true reason when you are asked why Concourse has been discontinued? I sincerely hope that you do—it would require no longer a communication than does your fabrication.

Mrs. McKenzie gave a deposition in this proceeding. Her views concerning the matters covered in the letter have not changed.

Mary Rogers Smith, former coordinator for children in the Los Angeles County library system, author of children's books, and winner of awards in her field, expressed her opinion of KHJ–TV's programming. "Jack the Ripper," "Pretty Boy Floyd" and "House of Wax" she regarded as unacceptable for children since they deal with violence, murder and glamorize crime. Based on

her general viewing of the station, she found very little constructive programming for children and many old movies. Of some 16 syndicated features KHJ–TV presented, when it was not showing movies, eight or nine she considered to be unacceptable for children. "Shrimpenstein" she found offensive to children because of the injection of off-color humor into the program. Old movies she found objectionable for children since such programming preempted time to the exclusion of better material.

Elizabeth Longstreet, radio and television chairman for the 10th District, Los Angeles P.T.A. (about 250,000 members), member of an advisory committee on "Head Start," the Economic and Youth Opportunities Organization, and the evaluation committee of NAFBRAT, also expressed her views. As a member of NAFBRAT she examines programming with a view to whether or not programs offered are suitable for children. It is her opinion that KHJ–TV's programming is "uninspired" and not always "entirely responsible." The majority of the station's time has been used for the showing of motion pictures. She complained to KHJ–TV's manager over the repeated showings by the station of "Jack the Ripper." After a conversation with Klein she came away with the impression that his view of the station's responsibility was that "the station was responsible to maintain a high level of viewers so that they would sell time to their advertisers." Her opinion of "House of Wax" was that it was a terrible and frightening movie and the televising of it during hours children could watch was irresponsible. "Shrimpenstein" she found to be unsuitable for children's viewing since it is ugly, grotesque and makes fun of daily life in a way children are unequipped to understand. Such shows are detrimental to children since they affect their behaviour and thinking.

Margaret O. Pollack, of Fullerton, California, a member of the Board of Trustees of the Fairview State Hospital, and member of the League of Women Voters, testified that the League had conducted a survey of emotionally disturbed children in the Orange County Public Schools in conjunction with California State College at Fullerton. A report of the survey indicated that there were thousands of emotionally disturbed children in the Orange County schools. Substantial authority exists for the proposition that films shown on television, which deal with crime and violence, have a detrimental effect on children. She had found to her consternation that one of her own children had viewed one of KHJ–TV's multi-run movies, "The Last Mile," the tale of a sadistic convict.

Dr. Allen M. Zeltzer is an associate professor of drama at California State at Fullerton, specialist in the analysis of the administration of educational television, teacher of television techniques and producer of programs. He testified that in his opinion KHJ–TV is a "movie station" and weak, as a station, in comparison with other Los Angeles independent television stations. His opinion was that television was moving in the direction of becoming an adjunct to the motion picture industry and that that condition interfered

with the function of television as a medium. KHJ–TV, he found, offered very little: only token broadcasts of public affairs and cultural programs, a condition he found which did not work for the area, and the community, in public service. In his opinion a good television station should have a provocative editorial policy.

Charlton Heston, stage, film and television actor, and president of the Screen Actors Guild, testified that television in Los Angeles offers no creative stimulus to performers, although two-thirds of the members of the guild's income comes from television, and of those two-thirds, one half comes from work on commercials. The Guild's records show that television is increasingly oriented toward commercialization. Heston notes that television programming merely provides separation between commercials. An independent station could pay actors to appear before its cameras, believes Heston, for many stars like himself would work for minimum scale on a "good" program. This would be particularly true if the program was local, for then the actors' mistakes would escape national attention. Feature films on television he deplores because of the extensive cutting of the films necessary to tailor them for television, and the constant interruption of them to accommodate commercial announcements. In Heston's view television broadcasters have a responsibility to raise the level of taste and quality. He believes programs aired at times that attract child viewers creates responsibilities as to content on the part of those who create programs. Violence on television, he believes, is a source of legitimate concern on the part of many people.

Fidelity Television, Inc., Corporate Structure

113. Fidelity Television, Inc., was incorporated in California on October 8, 1965. The corporation is authorized to issue 100,000 shares of common stock with a par value of $10.00 per share. At the present time 18 shareholders hold 3,395 issued shares, and 45,105 shares have been subscribed. The officers, directors and stockholders are:

Name and city of residence (all California)	Office	Number of shares		Percentage of interest
		Held	Subscribed	
William G. Simon, San Marino	President, Director	700	9,300	20.62
George R. Johnson, Long Beach	Vice President, Director	175	2,325	5.16
Walter B. Chaffee, Fullerton	Secretary, Director	350	4,650	10.31
Nello C. Di Corpo, Downey	Treasurer, Director	70	930	2.06
Henry Duque, Los Angeles	Director	350	4,650	10.31
Emmett H. Jones, Los Angeles	Director	350	4,650	10.31
Mervyn LeRoy, Los Angeles	Director	350	4,650	10.31
Louis J. Cella, Jr., Santa Ana		350	4,650	10.31
Phillip S. Twombly, Fullerton		105	1,395	3.09
William B. Dugan, San Francisco		70	930	2.06
John B. Lawson, South Laguna		70	930	2.06
Emmett C. McGaughey, Los Angeles		70	930	2.06
Edward M. Medvene, Encino		70	930	2.06
Richard A. Murphy, Pasadena		70	930	2.06
Edward L. Olsen, South Laguna		35	465	1.03
Anthony I. Owen, Beverly Hills		70	930	2.06
Thomas R. Sheridan, North Hollywood		70	930	2.06
Alexander Tucker, West Los Angeles		70	930	2.06

Diversification of the Media of Mass Communication

114. None of Fidelity Television's stockholders has any connection with any broadcast station, newspaper, or motion picture theater. One stockholder does have an interest in a CATV system.

Integration of Ownership into Management

115. Set forth below is a list of the stockholders who plan to participate in the operation of the station should Fidelity receive the license here at issue, together with the job they would hold, and the amount of time they would devote to the job.

William G. Simon, General Manager, Full time.

Nello C. Di Corpo, Director of Public Service Programming, Full time.

Phillip S. Twombley, Community Relations Coordinator, 20 hours a week.

Emmett C. McGaughey, Public Relations Coordinator, 10 hours a week.

William B. Dugan, Sales Coordinator, 15 hours a week.

Louis J. Cella, Health and Medical Program Coordinator, 5 hours a week.

Thomas R. Sheridan Discussion Program Coordinator, 5 hours a week.

George R. Johnson Educational Program Coordinator, 10 hours a week.

Edward L. Olsen Senior Citizens Program Coordinator, 5 hours a week.

Walter B. Chaffee General Counsel, 15 hours a week.

Finance Committee.—Walter B. Dugan, Chairman, Henry Duque, Emmett H. Jones.

Creative Program Committee.—Mervyn LeRoy, Chairman, Anthony I. Owen, Alexander Tucker.

Biographical Sketches

116. In the following subparagraphs biographical data on the Fidelity stockholders is set forth.

William G. Simon (President, Director, and 20.62% stockholder) was born April 17, 1913, at Douglas, Arizona. He attended Mt. St. Mary's College, California where he graduated cum laude, and the University of California at Berkeley where he received an LL.B. degree in 1940. From 1940 to 1964 he was a member of the Federal Bureau of Investigation. His residence in the Los Angeles area began in March 1960 when he became Special Agent in Charge of the Los Angeles Division of the FBI, which includes about one-half of California and about 11,000,000 population. In March of 1964 he retired from the Bureau and was honored at several testimonial dinners. Since leaving the FBI, he has engaged in the practice of law in the Los Angeles area and is in the same firm as Medvene, Murphy and Sheridan. He is also a salaried official of Leisure World Foundation, an organization engaged in the promotion and management of housing and recreational communities. In 1936 he had a radio show over a San Fran-

cisco station, a weekly book review program called "Contemporary Authors." While with the FBI he gave about 400 talks on citizenship and law enforcement to numerous civic groups. Since retirement from the Bureau he has continued to give these talks. When he was with the Bureau he belonged to several law enforcement organizations. In 1962–63 he served on the advisory council of Immaculate Heart College. He is a member of the Regents' Council of Mount St. Mary's College. In 1965 he participated in a seminar at Princeton on "Leisure." He has been honored by St. Mary's College for his work in community affairs. He is a trustee of the J. Edgar Hoover Foundation, a member of the California State and the U.S. Supreme Court Bars, the Wilshire Bar Association, the Los Angeles Club and the One Hundred Club. He has been a Deputy Grand Knight of the Knights of Columbus, a member of the Holy Name Society, he served on a panel during a Senior Citizens Day celebration at the Los Angeles City Hall, and has received a Mayor's Certificate of Appreciation for service to the City of Los Angeles. He speaks Spanish and has contacts in American-Mexican communities.

George R. Johnson (Vice President, Director, and 5.16% stockholder) was born March 19, 1917, in Price, Utah. His family moved to Long Beach, California, in 1920. He attended Long Beach public schools and is a graduate of the University of California, B.A., LL.B. He is a member of the California Bar. With the exception of about three years as Special Agent for the FBI (1942–1945) and one year in the San Francisco area (1945–1946), he has been a resident and lawyer in the Los Angeles-Orange area since 1940. Since January 1949, his office has been located in Long Beach. He is a member of the American Bar Association, Los Angeles County Bar Association, and Long Beach Bar Association, and has been active in Bar Association affairs. He is a member of the Chamber of Commerce of the United States, Los Angeles Chamber of Commerce, and Long Beach Chamber of Commerce, and has been active in Chamber of Commerce affairs. He is also a member of the Board of Trustees of the Memorial Hospital of Long Beach, the Board of Directors of the Better Business Bureau of Long Beach and a member of the Long Beach Council of the Navy League of the United States. He is a Trustee and Treasurer of Republican Associates in Los Angeles County, was a member of the Republican County Central Committee for Los Angeles County, and is a member of the Executive Committee and of the Budget and Expenditures Committee of the United Republican Finance Committee of Los Angeles. He is a Director of the Long Beach Legal Aid Foundation, Secretary and member of the Executive Committee of the Citizens Advisory Council on Public Transportation, a member and former director of the Kiwanis Club of Long Beach, a member of Phi Delta Phi Legal Fraternity, and of the Society of Former Special Agents of the Federal Bureau of Investigation.

Walter B. Chaffee (Secretary, Director, and 10.31% stockholder) was born on October 3, 1915, in Garden Grove, California.

He attended elementary and high school in Garden Grove, the University of California at Berkeley, and the University of California Law School. He practiced law in California, and was law clerk to Justice William O. Douglas of the Supreme Court. He has served as City Attorney of Fullerton and as Municipal Court Judge. He is now engaged in private practice in Fullerton. He is a member of the First Methodist Church of Fullerton and has served on several of its boards, including a term as Chairman of the Board. He helped organize the North Orange County Hospital Building Association, an organization instrumental in promoting construction of a hospital. He has been a trustee of a Hospital in Costa Mesa. He is a member of the Moose Lodge, is a director and past president of the Fullerton Boys' Club, a director and past president of the Family Service Association of Orange County, and a member of the Navy League. He has also been active in the local United Fund and in the Boy Scouts and YMCA, is a director of Friends of the University of California, Irvine, and a director of the Fullerton Junior College Foundation. Since 1949 he has served as Appeal Agent for a Local Selective Service Board. He is past president of the Orange County Bar Association, a member of the California Committee of Bar Examiners and of various State Bar Committees. He is past president of the 34th Congressional District Organization of Business and Professional Men and is president of the Orange County Democratic League. In 1962 he served as chairman of the Orange County Democratic Central Committee. He is a member of the California Non-Partisan Voter Registration Committee. He serves on the board of directors of the County National Bank in Orange, Occidental Savings and Loan Association in Stanton, and Founders Life Insurance Company in Orange.

Nello C. Di Corpo (Treasurer, Director and 2.06% stockholder) was born in Huntington Park, California, on May 3, 1931. He attended elementary school, high school and college in Southern California. From 1953 to 1959, he was Chairman of the Business Education Department of a school district. Since 1959 he has been employed by Cerritos College, Norwalk. He started as an instructor and supervisor of various activities at the College. Since 1963 he has been Dean of Community Services. This position encompasses a wide range of community related activities, including the following: coordination of community events; contact maintenance with community groups such as League of Women Voters, juvenile authorities, Attorney General's office on crime prevention, Southeast Recreation District, Department of Employment, and Los Angeles Music Center. He has helped set up workshops, seminars, clinics, institutes and special lectures to bring cultural programs to the campus. He has helped in preparing Community Services budgets, the maintenance of records and reports pertaining to educational services, assisted in preparation of a community calendar, worked with the executive secretaries of the Business and Recreation Citizens Advisory Committees, coordinated the Speakers' Bureau, supervised the

Art Gallery program, and worked with all the divisions in coordinating seminars, workshops, clinics and youth leadership conferences. He has also served as Executive Secretary of various advisory committees, a job requiring cooperation with community leaders. He has been a PTA officer and has attended a youth conference.

Henry O. Duque (Director and 10.31% stockholder) was born in Los Angeles on July 4, 1904, and has lived there almost all of his life. He has an LL.B. degree from Harvard, and is engaged in the practice of law. He is also a director of the Union Bank of Los Angeles, Sequoia Forest Industries, Inc., and Charles Luckman Associates. He has long been active in a variety of community activities. During World War II, he moved to San Francisco to accept the post of Director of Civil Defense, Northern Sector—a dollar-a-year job. To serve in this post he gave up his law practice. From 1939 to 1946 he was a Director in the American Red Cross. He served for 6 years as President of the Los Angeles Police Commission. He was a founder and the first President of the new Los Angeles Music Center and also a founder and first President of the Los Angeles Club. He served as Director and Secretary of the Civic Auditorium and Music Center Association of Los Angeles. He has been a member of the Board of Directors of the San Francisco Opera since 1955. He has also served as President and Chairman of the Los Angeles Symphony Association. He served as a Director of the Los Angeles Chamber of Commerce. Since 1946 he has been Chairman of the "Greater Los Angeles Plans," an organization devoted to planning civic and cultural improvements for Los Angeles. He was an organizer and first President of the One Hundred Club of Los Angeles. He has been a Trustee of Harvey Mudd College since 1956. He has been a trustee of the Leisure World Foundation since it was organized in 1964. He holds membership in the American and Los Angeles Bar Associations and the State Bar of California.

Emmett H. Jones (Director and 10.31% stockholder) was born in Denver, Colorado, on November 24, 1901. His family moved to Los Angeles in 1914. He attended high school in Southern California and was a student at the University of California. He is President and Director of the Industrial Engineering and Equipment Corporation, Los Angeles, and holds offices and interests in oil producing and refining companies and other enterprises in the Los Angeles-Orange area. He maintains residences in Los Angeles and Laguna Beach (Orange County). He is a member of the Los Angeles Chamber of Commerce, the Los Angeles Electric Club, the Petroleum Club, the Independent Oil and Gas Producers Association, the Association of Drilling Contractors, and the Western Oil and Gas Association.

Mervyn LeRoy (Director and 10.31% stockholder) was born in San Francisco, California, in 1900. He was a vaudeville performer in his youth, and later became a director of motion picture films. He has been a resident of the Los Angeles area since the 1920's and currently resides in Beverly Hills. His name has ap-

peared on a long list of popular screen successes, both as producer and director. He has had 20 pictures play Radio City Music Hall, and all-time record for any Producer-Director. He has worked with many of Hollywood's most distinguished performers. He now produces motion pictures in association with Universal Pictures Company. He once staged a homecoming for Generals Doolittle and Patton during World War II, which was attended by 175,000 people, the largest crowd ever assembled in the Los Angeles Coliseum. In recognition of his services to the Office of Inter-American Affairs, he was awarded the War Service Certificate by the Coordinator and Director of Inter-American Affairs. He is serving his sixteenth year as President of Hollywood Park Turf Club and is a trustee of the Racing Museum at Saratoga, New York. He was the first President of the Show Business Shrine Club, is a member of the California Museum of Science and Industry, and is a member of the Hollywood Motion Picture and TV Museum Commission. He has been Abbot of the Friars Club of California and has been honored by B'nai B'rith as "The Man Of The Year." He received many awards for his work in the movie industry and is on the Board of Governors of the Academy of Motion Picture Arts and Sciences. He is a member of the Board of Regents of Loyola University in Los Angeles, and is a Regent of St. John's Hospital in Santa Monica. He claims a considerable familiarity with the communities that lie south of Los Angeles and their problems.

Louis J. Cella, Jr. lives in Orange County. A prominent surgeon, and director of a clinic in Santa Ana, he belongs to a number of professional organizations and is active in civic affairs. *Phillip S. Twombly* is a lifelong resident of Orange County. For several years he was Vice President and General Manager of Blue Goose Growers, Inc., a major grower and marketer of fresh fruits and vegetables. He has a distinguished record of contributions to agriculture at both the local and national levels and is also active in local civic affairs. He is a 10% stockholder, officer and director of Pala Mesa Cablevision, Inc., operator of a CATV system at Fallbrook, California, serving about 400 subscribers. *William B. Dugan* is a longtime resident of Los Angeles. He recently moved to San Francisco. He is in advertising and merchandising. *John B. Lawson* is Vice President of Philco-Ford and General Manager of its Aeronutronic Division at Newport Beach. He has lived in the Los Angeles area since 1961 and has a distinguished record of participation and contributions both in business and civic affairs. *Emmett C. McGaughey* has lived in the Los Angeles area for 35 years. He is vice president of an advertising agency. An ex-FBI agent and former police commissioner, he has a long record of substantial activity in community, welfare and service organization affairs. *Edward M. Medvene* has lived in Los Angeles since 1960 and practices law there in a firm with Simon, Murphy and Sheridan. He is active in YMCA work and assists the American Civil Liberties Union in its litigation. *Richard A. Murphy* is forty years old and has

104-019—74——13

lived in Los Angeles since he was twelve. He practices law in Los Angeles with Simon, Medvene and Sheridan. He participates in the affairs of a number of professional organizations. *Edward L. Olsen* has lived in Los Angeles for 13 years. He has a law degree and is an ex-FBI agent and is now President of the Leisure World Foundation. He participates in a number of civic activities. *Anthony I. Owen* has been a resident of the Los Angeles area since World War II. He is president of a television program production company and is also active in motion picture projects. He has received commendation from United Community Campaigns of America and is on the board of trustees of a hearing research foundation. He has received citations for his professional achievements. *Thomas R. Sheridan* has resided in Los Angeles since 1953. He is a lawyer and practices in the same firm as Simon, Medvene and Murphy. He has occupied several conspicuous positions in the field of law. He is active in civic and governmental organizations. *Alexander Tucker* has resided in Los Angeles County since 1944, has a law degree, operates a citrus grove, and is an officer in a number of motion picture and television production companies. He belongs to a Chamber of Commerce and has participated in charity and relief activities.

Motivational Factors Behind the Filing of the Fidelity Application

117. Eleven television channels are allocated to Los Angeles. Los Angeles has about 3,000,000 population. Over 4,000,000 people reside outside the city but in the same general area. The proximate area with the greatest growth lies south and east of Los Angeles. In that direction lies Orange County with a population of over two and a half million. Orange County is recognized by the Census Bureau as a metropolitan statistical area separate and distinct from Los Angeles. By their very nature Los Angeles television stations are oriented in the direction of the "big" advertiser. A survey made on behalf of Fidelity involving 6,000 telephone calls, letters to 1,200 community leaders, and meetings with leaders in the field of education, government, commerce and cultural affairs gave Fidelity grounds for concluding that KHJ-TV of all the television stations serving the area was doing the least in the way of public service, that most of its programming was composed of old feature films and cartoons, and that there were many complaints against the station for excessive commercialism. Fidelity also read the Commission's Policy Statement on Comparative Broadcast Hearings with particular emphasis on the statements there concerning two cardinal Commission policies: (1) achieving the greatest possible diversification of communications media, and (2) placing the day-to-day operations of television stations in the hands of station owners. Viewed in the light of these considerations Fidelity concluded that conglomerate licensees cannot provide the fullest needed service in the public interest because to do so would curtail financial return to the injury of their investors. Moreover, Fidelity noted, conglomerates are inherently incapable of ownership being integrated into day-to-day station operations. As a final con-

clusion Fidelity decided that KHJ–TV was the antithesis of a public interest operation.

Location of Station and Use of RKO Equipment

118. Fidelity proposes to have its main studio in Norwalk, Los Angeles County, a city with a population of 88,856 located 15 miles southeast of Los Angeles. It also proposes to have an auxiliary studio in Anaheim, Orange County, a city with a population of 104,184. It conceives that these facilities will serve as local outlets for what it calls the "Southland," an amorphous area lying to the south and east of Los Angeles which includes Orange County.

119. In one of its exhibits Fidelity states:

> Should Fidelity be the successful applicant in this proceeding, it would contemplate negotiating in good faith with RKO General, Inc., for the purchase of such of its equipment and facilities, presently utilized incident to the current operation on Channel 9, as may be adaptable to Fidelty's proposed operations.

Need for the Proposed Station

120. Several witnesses gave testimony indicating a need for a television station to serve in the "Southland Area." Brief digests of their testimony are set forth in the next 20 subparagraphs.

Leland E. Oliver, an advertising and public relations man with offices in Orange County, believes Orange County is indeed a separate metropolitan area from Los Angeles. That fact is demonstrated, he points out, by the fact that about 85% of Orange County residents work in Orange County.

Dr. Daniel G. Aldrich, Jr., Chancellor of the University of California at Irvine (Orange County), stated that his school has never been approached by any Los Angeles television station and asked how a station might serve his school or the community. In business, cultural and educational resources, he feels Orange County is a separate area from Los Angeles. He feels Los Angeles television stations have little identification with Orange County in that advertisers, sponsors and personalities are from Los Angeles. In his view Southern California television stations are "faceless" in that they are not aimed toward a particular community interest and are not particularly sensitive to local need.

Gerald S. Jacobs, a long time resident of Long Beach (population 370,000), active in a number of civic organizations there and President of the Board of Education, stated that although Long Beach, during the past few years, had a number of important problems to cope with, to his knowledge no coverage was given those problems by Los Angeles television stations. He has no knowledge of any television programs that devote time to Long Beach public affairs on a regular basis. In his view Long Beach residents are not primarily interested in Los Angeles news and feel they have been neglected and relegated to second place.

William J. Mooney, Chief of Police of Long Beach and active in civic affairs there, stated that Los Angeles television channels gave practically no news coverage to the law enforcement and civic activities of Long Beach. Programs of his department such

104–019—74——14

as "Lock Your Car," "Stamp Out Crime," and "Law Enforcement on Display," designed to elicit citizen cooperation with the police, received no such coverage. In his view residents of Long Beach consider themselves a separate community from Los Angeles.

Gene M. Bishop, Division Manager of Insurance Securities Trust Fund & Life Insurance Company of California, and President of Long Beach Chamber of Commerce, testified that Long Beach is a major industrial area with fine harbor facilities. Long Beach residents consider themselves separate from Los Angeles, and have independent cultural and educational identity. In his opinion television could be a great help to Long Beach. A local "Job Fair," designed to provide employment information to the needy, would have assisted many more people if television coverage had been available. To his knowledge, important problems pertaining to ownership rights in oil deposits over the past three to four years have received little coverage on television, and no television station has contacted the Chamber of Commerce to inquire how it may help.

William H. Hirstein, a member of the Board of Supervisors of Orange County, California, for twelve years, testified that he and the other members of the Board signed an affidavit which stated that community service programs such as those that had been outlined to him by Fidelity were not being broadcast in the Orange County area; that there is a need for these types of programs; that Orange County is an area with over 1,200,000 inhabitants with no television outlet; and that it is distressing not to be able to effectively communicate the needs of this fast growing county.

Cecil Hicks, District Attorney of Orange County, testified that his office has responsibility for prosecution of all felony cases that arise in Orange County, and in all but five or six cities his office also prosecutes misdemeanors. To his knowledge, the only television coverage his office receives is one newsman from Channel 2, who covers the courthouse area. He has not been contacted by any of the Los Angeles television stations to ascertain what public service programming may be beneficial to the District Attorney's office, or the community at large.

Mary Michaelyn Schultz, organizer of the Arts Colony of La Mirada, California, active in community affairs of La Mirada for a number of years, and present member of the Cerritos Fine Arts Associates, stated that at various times the organizations she has worked with have attempted to obtain television publicity or coverage of special events, such as an "Arts and Culture Festival" and a program called "Culture at the Grass Roots." However, they were unsuccessful. She attended a meeting at Cerritos College where representatives of Fidelity Television, Inc. met with some 50 community leaders. At this meeting a question and answer session was held to determine how Fidelity could serve them, and what they wanted to see on Fidelity's public service programs. No Los Angeles television station has ever contacted her to ascertain the needs of her community.

Dr. Charlotte Frances Stevenson, Supervisor of Music of the Bellflower Unified School District since 1946, member of many professional societies, and active in community affairs, testified that a recent international music symposium, "Creativity and Participation in Music Education," was recently held in Bellflower, California, near Los Angeles. People from all over the United States attended the symposium. There was no television coverage of this event even though coverage was solicited by members of the organization. In her opinion, there is not adequate opportunity on Los Angeles television for musical education programs. There is, however, a great deal of local talent available. She represented her school district at a meeting of community leaders held by Fidelity Television, Inc., at Cerritos College, where there was discussion as to how Fidelity could serve the area. To her knowledge, no television station had ever sought out expressions from her community. There is little television coverage of the events in her community.

Reverend Herman Mees Meyer, Senior Pastor, First Lutheran Church, Fullerton, California, and associated with the church for 15 years, testified that there is a need for members of a community to have a sense of identification. In his 15 years in Orange County, none of the Los Angeles television stations has ever contacted him. No television air time has been made available for exposure of Orange County religious matters to his knowledge. In his opinion, there has been less opportunity for religious television programming in the Los Angeles area than in any other section of the country in which he has served.

Reverend Kenneth A. Stewart, President of Pacific Christian College and a resident of Long Beach, California, testified that the college presents musical festivals, programs and choral productions but has never been approached by a Los Angeles television station for the purpose of presenting a program. The school would be very interested in television exposure, and feels capable of supplying the performers for such programs.

John Laurence Barrett, Secretary-Treasurer of Buffums Department Store, with branches in Long Beach, Long Beach Marina, Santa Ana, Pomona, Palos Verdes and Lakewood, testified that he is active in the Long Beach Chamber of Commerce, Better Business Bureau, the United Way and the Long Beach Community Chest. The Better Business Bureau's function is to disseminate information to the public in order to protect them from unethical businessmen. To his knowledge, no Los Angeles television station has ever approached the organization to determine what they could do to aid it. Excluding some spot announcements the same is true of the United Way, in which he has been active.

Calvin C. Brack, Secretary-Treasurer of Brack Enterprises, Incorporated, a resident of Orange County since 1955, Mayor of Westminster, California from 1961–1964, and former member of the West Orange County Water Board, participated in the decentralization of Orange County, and a water bond issue in West-

minster. There was no television coverage of these projects and none was offered by Los Angeles television stations.

Joyce Susan Vivian Brenner, a resident of Santa Ana, California, voice teacher, and Chairman of the Educational Programming Committee of the Charles W. Bowers Memorial Museum Foundation in Orange County, testified that the museum offers lectures, concerts and other cultural events. It also has an archeological society and a county historical society. She was once employed in television as a staff member of NBC. Based on her past experience in television, and present work with the Bowers Museum, it is her opinion that there has been no separate cultural image of Orange County established by the Los Angeles television stations, even though there is a wealth of cultural events taking place there. There has been no television exposure of these many events. She has never been contacted by any Los Angeles television station to determine programs of the museum available for broadcasting. In her opinion, the programming of KHJ–TV is not stimulating since viewing films 10 to 20 years old is not very challenging.

Galal Joseph Kernahan, a resident of Anaheim, California, and Executive Secretary of the Garden Grove Education Association, testified that Arnold Pike, coordinator of radio and television for the Southern California Teachers Association, and producer of "Dateline Campus," aired on KHJ–TV, visits Orange County infrequently. In his opinion, Los Angeles television stations are interested primarily in the Los Angeles area, especially in respect to newsworthy events.

Roland E. Bigonger, a resident of Yorba Linda, California, Orange County, an attorney, and active in civic affairs, testified that he has been a resident of Orange County for 35 years, and that there are many civic events of interest which have taken place in Orange County throughout this time. In his opinion, Orange County is a separate community with separate interests. He ran for political office in 1966, but was offered no television time. In his view Los Angeles television stations broadcast few newsworthy events involving Orange County.

E. Frederick Bien, City Administrator of the City of Norwalk, California, in Orange County, testified that Norwalk is one of the "Southeast" communities which lie southeast of Los Angeles. The only sources of local information concerning Norwalk are throw-away newspapers. The only television coverage they have received has been limited to some spot promotions when the city dedicated its new City Hall about two years ago, and to his knowledge, there has been no television exposure by way of a program devoted to public affairs within the area. He feels there is a great need to develop public awareness of the importance of local government through the dissemination of information to the people, and that television is the best practicable way to do it. In his opinion, Norwalk is not a suburb of Los Angeles.

John H. Corcoran is a resident of Artesia, California, and manager of the Cerritos Chamber of Commerce. Cerritos is about 12

miles from downtown Los Angeles. His community gets no television coverage unless they come up with something spectacular. In his opinion there is a definite need for television coverage in the "Southland" communities. At present about the only means of communication are "throw away" newspapers. School bond elections have poor turnouts because there is no means of getting messages concerning them across to the public. He has no knowledge of any Los Angeles station ever making an effort to determine service area needs. KHJ–TV, in his opinion, primarily shows old movies. He feels television should be better utilized. Local events such as a "Pan American Festival" involving Lakewood, Norwalk and their sister cities in Mexico receive no television coverage. Areas such as the one he lives and works in are acquiring cultural facilities. Communications would help facilitate their development. The Hollywood Bowl, the Music Center and the Sports Arena get real coverage. Some of the people who attend those places might come to the "Southland Area" if they knew what was going on.

Dr. Allen M. Zeltzer, an Associate Professor of Drama at the California State College at Fullerton, testified that the residents of Orange County have their own cultural events, educational events, fairs, schools, and governments, which give the County a separate identity from Los Angeles. The people in Orange County consider themselves independent of Los Angeles County, and the City of Los Angeles. There is a great wealth of local talent in Orange County which could be used for television programming. In his view there is an advantage to local ownership of a broadcast facility because under such aegis it can provide more public service programming. Los Angeles television stations do not provide an outlet for Orange County expression.

Margaret O. Pollack, a resident of Fullerton, California, member of the Board of Trustees of Fairview State Hospital, and a member of the League of Women Voters, testified that Orange County has a separate identity from Los Angeles, and television coverage does not give expression to the County's community needs. To her knowledge, no Los Angeles television station has contacted the League of Women Voters of Orange County to determine their needs, even though the organization's purpose is primarily public affairs.

Program Proposal

121. The record contains no facts on how Fidelity would program its station (see paragraphs 3, 6, 8, 10, 11, 13, 15, 18, 19 and 20 of the Preliminary Statement).

Findings of Fact

(Second Phase of Hearing)

TRADE PRACTICES OF GENERAL TIRE AND INVOLVEMENT OF KHJ–TV

How the Subject Got into Hearing

122. The mechanics of how the above subject got into hearing, and the limitation placed on the issue, are described in paragraphs 10, 12,

14–16, 18–20, above. As a further preliminary to the findings which follow, it might be well to point out why the head-noted subject is in issue.

123. There is an old saw to the effect that a backwoods mother was notified by a horrified witness that one of her children had just been eaten by an alligator. According to the tale, her only response was that she had been telling her husband that *something* had been getting their children.

124. The media of exchange in the market place of broadcasting now takes several forms. Programs are not usually sold for individual sponsorship. Something called a "participating spot announcement" is the station's main product. These announcements are items of commercial matter carried in batches before and after bits of program material in the expectation that viewer interest in what has gone before and what promises to come after will render the viewer sufficiently quiescent to permit the flow of the commercial matter to wash across his mind. The product is sold in a variety of ways. To national advertisers and Madison Avenue it is sold on the basis of a station "rate card" by specialists in the field who are quartered in those large metropolitan areas where the purchasers are located. These specialists represent large groups of stations, sell millions of dollars worth of advertising time, and are remunerated on a gross-volume-percentage-of-sales basis. Local advertising and regional advertising are for the most part vended by salesmen attached to local stations. These agents, too, employ rate cards and are remunerated on a percentage-of-sales basis. Commercial announcements are also the medium of exchange in "trade deals." These transactions usually involve the direct exchange by the station of blocks of spot announcements to some purveyor of goods or services, or his agent. The station product is traded for various kinds of goods and services ranging in value from a meal ticket to a luxury car or a trip to Europe. Such transactions, needless to say, are usually the prerogative of ownership or top management. Finally, spot announcements are also disposed of through "Barter Houses." These establishments, in composition, resemble both a "Swap 'n Shop" and a bank. They are in the business of acquiring from the stations, for the same kind of consideration involved in "trade deals," such time as the station has the temerity to allocate to purely commercial matter not otherwise sold or traded. The announcement time thus acquired, the "Barter Houses" sell off piecemeal to advertisers at a fraction of the consideration the announcements would otherwise command.

125. On the basis of pleadings filed by Fidelity with the Examiner, it was his judgment that not only was there a reasonable basis to believe that some of the sales practices through which KHJ–TV disposed of advertising time might not only provide facts germane to the central issue here, but they also might well disclose a sales practice not previously identified but one that, nevertheless, might be illuminative of the purposes for which this nation's broadcast time is being used. The pleadings suggested that at least some purchasers of KHJ–TV's advertising were not buying time primarily for the sake of buying time, but rather to keep General Tire and Rubber happy. Now the span of a broadcast day is a measurable concept. The constant inroads

made by advertising time on programming, during a broadcast day, are ever present happenings, plain for all to see. It seemed to the Examiner that if, in addition to the forces of attrition against programming already described, there was another such impetus, it should be identified, if for no other reason than to insure that the public and its representatives were not placed in the position of the mother in the story who, through ignorance, was only cognizant that something important to her was disappearing.

Some Background Facts on How Trade Relations Works at General Tire

126. The disposition and acquisition of products and services are not all processed through conventional sales and procurement channels at General Tire and its subsidiaries. That is to say that products and services bought and sold by General Tire and subsidiaries are not exclusively handled by procurement or sales personnel. For example, in an effort to cut costs at its synthetic rubber plant in Marion, Ohio, an arrangement was made whereby Olin-Mathieson, one of several firms that furnished a product called "polyol" used in the synthetic rubber process at Marion, was given a fixed percentage of the plant's "polyol" business. This arrangement resulted in the reduction of sales by other suppliers of the product to the plant. General Tire's Director of Purchasing asserted that he had no knowledge of the terms of the agreement but had merely been notified by "management" to procure "polyol" primarily from Olin-Mathieson. As will be seen later, the record is replete with evidence of sales efforts made by General Tire personnel who are not affiliated with what would ordinarily be considered a company's sales staff. The record is also full of evidence that sales and purchases carried on outside of normal channels involve contemplation, by both General Tire and those with whom they negotiate, of the purchases and sales made by both, from each other. Numerous witnesses testified that the theme of trade relations was "you buy from me, I buy from you." Evidence here further makes clear that numerous persons bearing a variety of titles are employed by General Tire and its subsidiaries to contribute to such negotiations as those described above, that these negotiations bear fruit, and that RKO and KHJ–TV are frequently either involved in, or are the beneficiaries of, such negotiations.

127. In the parlance of the trade these extraordinary negotiations are conducted under the rubric "trade relations." As far as this record is concerned the key figure in this field was John G. Ragsdale, General Tire's Director of Trade Relations from 1961 to 1966. Among others involved in "trade relations" were James B. Filson, Ragsdale's West Coast Assistant; G. Lawrence Murphy, Jr., Ragsdale's Assistant in Akron; Robert E. Wilke, Director of Corporate Relations for RKO; Harry Trenner, RKO's West Coast Division Director; Donald Quinn, Director of National Sales for RKO; and Sam Slate, Vice President of RKO.

128. Ragsdale, when he took over the trade relations position, set up files on all companies that traded with General Tire and its subsidiaries either as buyers or sellers, as well as files on any company not thus qualified but listed in *Fortune Magazine's* roll of top U.S. cor-

porations. Ragsdale's files contained data on the amount of business consummated annually between the subject company and General Tire and its affiliates, a list of persons at the subject company that might be contacted for a trade relations approach, and a running summary of the current state of affairs between the subject company and General Tire and its affiliates.

Trade Relations Practices in Action

129. In an effort to show that the trade relations practices of General Tire at KHJ–TV rendered a disservice to the public interest, Fidelity, who it is to be remembered alone carried the burden of proof on the subject, introduced into evidence facts concerning a number of specific instances of trade relations practices between the General Tire complex and several of the companies with whom it dealt. These facts are here digested and set forth in the paragraphs which follow under the name of the company with whom General Tire carried on the negotiations.

Aluminum Company of America

130. On January 4, 1962, Wilke wrote the Director of Trade Relations of Alcoa referring to a prior telephone conversation, forwarding a list of RKO broadcast facilities, noting that advertising negotiations were coming up, expressing gratitude for cooperation, and expressing expectation of continued beneficial association between General Tire and Alcoa. On the same date he wrote an inter-office memorandum saying that he had discussed with an Alcoa official the association between Alcoa and General Tire, including help on upcoming Boston radio business, and had obtained a promise that the official would go to bat with Alcoa's advertising department. Optimism was expressed that the Alcoa official's intervention would aid RKO's sales efforts with Alcoa's advertising agency. On January 29, 1962 a General Manager for Field Sales for Alcoa wrote to Wilke reporting that he had put in a good word with Alcoa's advertising people on behalf of RKO's Boston station but found that Alcoa felt that it should stay with another Boston station, WHDH, because of prior successful experience there and the superiority of WHDH for Alcoa's purposes. Regret was expressed for the negative report and assurance was furnished of favorable consideration being given other RKO stations when they could fit into Alcoa's programming. On March 12, 1962 Wilke wrote Ragsdale forwarding a tabulation of the amount of business RKO stations received from General Tire's leading suppliers from October 1, 1960 to September 30, 1961. The list had been compiled by RKO Sales. Wilke advanced the opinion that the figures were on the short side, noting that he had been informed by Alcoa that they had spent $105,000 on RKO's several radio stations. The list reported Alcoa as spending $31,073. On January 31, 1963 Ragsdale wrote Wilke that he had received from Alcoa a list of their purchases from three RKO stations for 1962 including $8,000 with KHJ, Los Angeles. Wilke was asked to check the accuracy of the figures.

131. On February 25, 1965 an Alcoa official wrote to Wilke acknowledging a letter from Wilke and stating that a survey had been run on Alcoa activities in connection with RKO properties. The letter ex-

plained that Alcoa's main use of radio and television was through national networks. However, the letter noted, RKO's facilities were being used at least to some extent. Alcoa's expenditure on RKO's San Francisco station was given, as well as an expenditure of $2,192 for KHJ. The writer stated that he was passing the information contained in Wilke's letter on to Alcoa's two advertising agencies "with the recommendation that 'all things being equal,' it would be helpful if we could do business with some of your other broadcast properties." The letter concluded with the observation that the writer would be glad to meet with General Tire representatives and suggested that the latter be sure and meet the person in charge of Alcoa's broadcast activities.

132. On May 5, 1965 Wilke wrote the Manager of Trade Relations of Alcoa. The entire body of the letter reads:

I just received word from the manager of our Chicago operations that he had confirmation of the Alcoa schedule for KHJ–TV.

He was elated the way things worked out and I want to thank you for your prompt efforts in our behalf. Will see you in New York the week of the 17th.

133. On July 2, 1965 an Alcoa inter-office memorandum stated that an attached document had been discussed with Wilke who seemed well pleased. The attached document was also an Alcoa inter-office memorandum reporting four purchases of advertising time by Alcoa over RKO stations. The memorandum further stated that in respect to a second wave of TV time purchases that was to shortly occur, Alcoa's advertising agency would be asked to make every effort to schedule time on RKO stations. Projecting past purchases from RKO with future purchases, the memorandum forecast a $10,000 figure for current year purchases by Alcoa from RKO stations for its aluminum-beer-can-easy-opening-top advertising campaign.

134. Alcoa spent no money with KHJ–TV in 1962, 1963, or 1964. Between January and November, 1965 it spent $8,069.

American Airlines

135. In a General Tire Trade Relation and Customer Activity Report on American Airlines the following item appears for October 26, 1962:

Filson to JGR [Ragsdale] in addition to the million a year we spend for tickets with American Airlines, note Aerojet has paid them $102,000 past nine months for Air Freight.[5] RKO up till last year enjoyed some business with their advertising agency until they changed agencies and RKO was dropped. I understand their advertising contract for 1963 is coming up and RKO is trying to get back in. I am going to see District Sal Manager [sic] of American here and solicit his assistance. Caffee advised that unless there is some reason such as schedules and routings that require use of American, we need not favor them. You might want to pass this on to Bob Wilke.

136. On November 8, 1962, Wilke wrote a letter to the Vice President of American Airlines for Public Relations, the body of which reads:

I enjoyed lunching with you yesterday and appreciated the opportunity to talk to you about the scope of the General Tire operation.

[5] Aerojet is a subsidiary of General Tire.

For your information the identity and location of the RKO General broadcast facilities is as follows:

Radio	*Television*
New York, WOR	WOR–TV
Boston, WNAC	WNAC–TV
Detroit, CKLW	CKLW–TV
Los Angeles, KHJ	KHJ–TV
Memphis, WHBQ	WHBQ–TV
San Francisco, KFRC	
Washington, WGMS	

I know that our entire organization will be very pleased if the RKO General radio stations are permitted to share in the forthcoming American Airlines campaign.

137. There is evidence that RKO sold American Airlines over $100,000 worth of advertising in 1961, and that KHJ–TV after 1964 sold American Airlines some advertising.

Burlington Industrial Fabrics Co.

138. On July 13, 1961, the Vice President of Burlington Industrial Fabrics Co., Thomas B. Hill, wrote Wilke concerning a telephone discussion between the two held the day before. The subject was Burlington's broadcasting schedule for the fall on behalf of its support-hose division. In the letter Hill reported that the President of Burlington's Industrial Fabrics Company had held discussions with Burlington's Hosiery and Publicity Departments along the lines of prior discussion between Hill and Wilke so that it would be known that Burlington was "putting in an oar" for both its Industrial Fabrics Company and General Tire. The advertising agency handling the campaign was named and a recommendation was passed on that Wilke should keep in close touch with the agency. Note was taken of the fact that the agency would undoubtedly be interested in optimum coverage but it was also noted that the facts concerning mutual interests and present business relationships had also been passed along.

139. The record does not show what, if anything, Burlington Mills spent on KHJ–TV. It does show that between October 1, 1960 and September 30, 1961, it spent $1,657 with RKO.

Cardinet Candy Company

140. After effort in that direction was made by Filson, some time in 1962 or thereabouts, candy machines of the Cardinet Candy Company were installed in Aerojet plants. Subsequently, Cardinet gave KHJ–AM a $10,000 order for advertising. Filson was complimented for his efforts by "RKO Sales." The commendation pointed out that previous efforts to sell Cardinet had been unsuccessful and without Filson's help the Cardinet order could not have been achieved.

141. There is no evidence that KHJ–TV received any business from Cardinet as a result of Filson's effort.

Carnation Co.

142. In 1962 Carnation was an advertiser over KHJ–TV. In a memorandum from Filson to Ragsdale written in July of 1962 the following statement was made:

The Cafeteria [Aerojet's] is catered by Hording-Williams of California. Under the contract Space General [Aerojet] controls the brands of products used. Car-

nation dairy products were specified, as we are now getting the Carnation tire business in Los Angeles.

143. Carnation did purchase advertising time on KHJ–TV. There is no direct evidence, however, that the purchase of such time formed any part of the consideration for Carnation dairy products being used at General's Aerojet cafeteria.

Duncan Coffee Co.

144. In a memorandum from Filson to a W. A. Robinson dated August 19, 1963, with copies to Ragsdale and Murphy, Filson stated: "I have just completed arrangements with the Duncan Coffee Company of Houston, Texas for exclusive use of General Tires on all their vehicles." The letter went on to outline the particulars of the arrangement. On November 5, 1963, Filson wrote Ragsdale that Huggins-Young, a subsidiary of which produces Butternut Coffee, does considerable radio and television advertising on the West Coast, some of it through KHJ. Filson said that he had briefed Trenner "on our relationship" and that Trenner's people would talk to the "advertising people" and that "this" would enable them to get additional advertising. On November 20, 1963, the Vice President of Huggins-Young sent Filson a report on the number of tires Pico Lease had bought from General Tire through Mileage Consultants. The purchases totaled $5,500. The letter also assured that Huggins-Young had bought some time on KHJ–TV. On November 22, 1963 Filson wrote to Ragsdale re "Duncan & Huggins-Young" that "Pico Lease" is the company established by Mileage Consultants to handle lease of vehicles to Duncan Coffee in Texas and that Pico Lease had bought $5,500 worth of tires in three months. On the same subject, Filson reported that Boulevard Lease was the West Coast counterpart of "Pico Lease." Filson said that he would forward the quarterly report of Boulevard Lease to Ragsdale and asked Ragsdale to note that Boulevard Lease is also doing advertising on KHJ.

145. The record shows that while Pico Lease and Boulevard Lease spent no money with KHJ–TV between December 1, 1962 and November 30, 1965, Duncan Food Co. during that period, in 1963, spent $15,307 with the station.

Equitable Life Assurance Society

146. Thomas Ferns sold the original group life insurance policy to General Tire and Rubber for Equitable. Thereafter he sold group policies to General Tire subsidiaries. Ferns had long been with Equitable and since 1934 had handled General Tire and its subsidiary accounts.

147. On November 13, 1962, Trenner wrote to an RKO official:

> I was impressed with the Equitable meetings, especially when I learned that the General Tire Company policy represents more insurance than lots of fair size companies in this country.
>
> We surely must be paying Equitable a lot of money. Enough, in fact, so that they are able to buy time on competitive radio stations in Los Angeles and leave KHJ and KFRC off the list.
>
> I am sending Mr. Ragsdale a copy of this letter. He will get the point, I am certain.

148. Ragsdale responded on November 15, 1962, and recommended that the man in charge of group insurance at Equitable be contacted. He agreed that RKO should get some business from Equitable in view of the amount of business General gave Equitable.

149. On January 22, 1963, one of RKO's station employees at Detroit, reporting lack of success in selling advertising to Equitable over CKLW, suggested that General Tire should put pressure on Equitable. On January 30, 1963, Thomas Ferns sent telegrams to a Vice President and an Agency Manager of Equitable in San Francisco. Ferns noted that he had recently been in San Francisco installing group life insurance at RKO's KFRC. Some time thereafter he learned from the manager of the station that Equitable's advertising agency was going to review advertising contracts for Equitable in the Bay Area. Ferns asked as a personal favor that the advertising be placed with KFRC. Equitable's Agency Manager in San Francisco responded with a long letter to Ferns. He stated that he had investigated the matter. He found that Equitable's advertising agency in selecting outlets for advertising throughout the country had included four of RKO's stations but that KFRC had been eliminated because of inadequate coverage. Despite group coverage and the Tom Ferns relationship, Equitable's advertising department could not justify buying from KFRC. The Agency Manager noted that the atmosphere had become disagreeable since the RKO representative had indirectly threatened to take away Equitable's business.

150. On February 1, 1963, Ragsdale wrote Ferns that while RKO was getting some business from Equitable, they were having trouble in Boston, San Francisco and Los Angeles. The letter said that RKO salesmen did not want to be overly aggressive but the station managers found it hard to reconcile the fact that they are not being given an opportunity to run advertising for Equitable while it is being placed in their markets on competitive stations. Ferns' "good offices" were solicited to see "if you can help us in this particular situation."

151. On the same date an RKO official by letter thanked Ferns for the "pitch" he had made on behalf of KFRC, and a Regional Vice President of Equitable at San Francisco in an inter-office memorandum of conversation, noted that Ferns had called mentioning that he had telegraphed two Equitable officials urging that KFRC be favorably considered. The memorandum concluded with the following observations: it appeared RKO was not receiving Equitable advertising in Los Angeles; because of this Ferns thought an Equitable official should meet with officials of Aerojet to have Equitable's advertising channeled through RKO; the writter thought it better that he pursue the matter with "Home Office" advertising and public relations people, to which suggestion Ferns agreed; Ferns would supply a list of stations and persons to be contacted.

152. On February 5, 1963, Ferns gave Ragsdale a summary of Equitable's efforts on RKO's behalf concluding with the view that Equitable business could probably be obtained for RKO's Los Angeles and San Francisco stations but not for its Boston station because of labor union problems Equitable was confronted with at WNAC (RKO's Boston station). The letter closed with assurance from Ferns

that he would do everything he could to get business for RKO and General Tire.

153. On February 5, 1963, Equitable's advertising manager was also writing Ferns. She said she was sorry KFRC, San Francisco, could not be used in Equitable's current spot radio campaign but good schedules had been placed at four other RKO stations. She explained many factors had to be considered in radio purchases and RKO's San Francisco and Los Angeles stations just didn't measure up, their ratings being so poor that Nielsen didn't even list them. Explanation had been made to RKO's New York salesman. Whenever possible RKO's stations had been used with full knowledge of the importance to Ferns of such use.

154. On the same date Ferns wrote the Equitable official to whom he had previously phoned and again asked for help on RKO's Los Angeles and San Francisco stations. Ferns said he was puzzled by Equitable's advertising agency's reliance on Nielsen ratings since in Akron Equitable had a radio campaign that was using three stations, two of which could hardly qualify from a market coverage basis. Ferns said he was disturbed by the veiled threat of taking RKO business away from Equitable. This letter closed with this language:

> Please use all your excellent persuasive efforts to have the Equitable use both KFRC in San Francisco and KHJ in Los Angeles. Harry Trenner in Los Angeles, Director of West Coast Operations, is a wonderful person and if there is any possible chance of our doing business with them, we certainly should do it because they have a splendid organization in Southern California. As I told you on the phone, the second day after the Group Insurance became effective, December 2, we had a $12,000 death claim in Los Angeles.
>
> The organization in San Francisco under Al Rocco is also of very high caliber. They do not, however, have a TV Station but it seems to me that they could be very favorably considered for some business from us regardless of their market coverage.
>
> As you know, Walter, I do not like to use pressures but I don't know of any other Broadcasting System that is doing business with the Equitable and certainly RKO-General, Inc. should be favored because they are a wholly-owned Subsidiary of General Tire and Rubber Company.
>
> Good luck and I would appreciate hearing from you before you leave New York. With kindest regards.

155. On February 28, 1963, Trenner wrote to Ferns. In this letter Trenner said: He was glad to have recently visited Ferns; the last time they had been together a good share of General Tire's west coast radio operation had purchased the Equitable Insurance package; he was interested in what Ferns had told him as to why the RKO west coast stations had been excluded from the Equitable spot radio buy; he had been on Madison Avenue for 15 years and he knew they had to employ a certain set of criteria but "slip stick" measurement without further necessary knowledge could at times be misleading; there was nothing mandatory in RKO's buying Equitable insurance, however the company's recommendation carried great weight as did the persuasiveness of Ferns, Equitable's reputation, and "a little boost from some of us out here"; but "was it the cheapest buy we could have made?"; Ferns' response to such rhetorical questions was well known; nothing was expected in return for RKO's having bought Equitable

insurance, but the chagrin and hurt pride of RKO could be imagined when it was learned that Equitable was advertising only on RKO's competitors' stations; such concerns did not occur to purchasers of advertising on a nation-wide basis; merely because some RKO stations had been purchased did not mean that RKO had been favored to any great extent; advertisers over WOR in New York feel lucky to be on the station; it was hoped RKO's message would get to the right Garcia; RKO's advertisers did not consider their money confetti; insurance companies that advertise over RKO do not think they've made a bad buy; indication of future consideration was "rather poor reciprocation for the job we did for you out here." The letter concluded with thanks in anticipation of future efforts in behalf of RKO. Copies of this letter were sent to Ragsdale, Watson and Quinn.

156. On March 28, 1963, RKO inter-office correspondence indicated that Tom Marks at KFRC was "shook up" every time he saw an Equitable advertisement over a competitor station and inquiry was made if the matter could be reopened with Equitable's advertising agency. He was informed that the agency considered the matter closed, that RKO's national sales manager had talked to Equitable's advertising manager again reminding of the relationship between Equitable and General Tire but found the latter in agreement with the agency. Wilke advised that at national headquarters of General Tire attempt was made to "get the whole thing resolved once and for all," noting that since another advertising campaign was coming up it would be nice to know that Equitable, and their advertising agency, had their signals straight.

157. On April 11, 1963, an Equitable Vice President wrote to Trenner saying that he had had a pleasant conversation with Wilke, that Equitable was planning a spot radio campaign in the fall and that then all stations would be reviewed. Trenner's recent letter to Ferns had been forwarded to him and would be placed in the review file.

158. There is no evidence that Equitable ever bought any time over KHJ–TV as a result of the General Tire efforts outlined above.

Fugazy Travel Bureau

159. On November 1, 1962, Ragsdale wrote to Jack Poor of RKO saying that he was sending an attached letter to all General Tire facilities which could be served by the Fugazy Travel Bureau. Ragsdale stated that Fugazy would report to him on a semi-monthly basis and that a system would be established whereby a check could be made on Fugazy's figures. The attached letter stated the following: General Tire had entered into a corporate-wide agreement with Fugazy whereby it would use Fugazy facilities wherever possible for transportation reservations and tickets; an explanation would be furnished of facilities available to General Tire; in the future instead of dealing with carriers, transportation should be obtained from Fugazy; use of Fugazy would materially lower transportation costs to General Tire. On March 14, 1963, Ragsdale wrote Aerojet to the following effect: General Tire in Akron had been using Fugazy with good results; when agreement had been made with Fugazy, Aerojet had been fully informed and had promised full cooperation; thus far Fugazy

had received no Aerojet business and was completely staffed and ready to handle such business; use of Fugazy benefits General Tire; lack of service might offset benefits but experience in Akron had been good; it would be appreciated if the Fugazy program would be started at Aerojet as soon as possible; if there were good reasons why Aerojet could not be used an explanation would be appreciated. On April 18, 1963, Fugazy wrote Aerojet to the following effect: an appeal was being made for fair play and ethical business; a handshake agreement had been made in New York in September 1962 under which Fugazy agreed to spend an amount equivalent to 1½% of its gross billings to General Tire on advertising over RKO stations in exchange for handling the travel of General Tire and its subsidiaries including Aerojet; while establishment of a Fugazy office in Akron had been easy, on the West Coast, because of Aerojet volume and nature of traffic, the problem was different; Aerojet officials had been cordial and cooperative and a proposal submitted by Fugazy had not been disapproved; on the basis of agreements and discussions Fugazy had spent $20,000 on West Coast installations; Fugazy had been informed of termination of agreement. The letter concluded with a long argument on behalf of Fugazy and assurance was made that the matter could be worked out. On April 18, 1963, the President of Fugazy wrote Tom O'Neil referring to the difficult time his agency was having with Aerojet and soliciting O'Neil's intervention in the matter. Reference was made to the fact that $20,000 had been spent by Fugazy in setting up West Coast offices and that it would be very unfair to take the account away. Reference was also made to a rumor, attributed to lower echelon personnel at Aerojet, that American Airlines was considering removing business from RKO unless the Fugazy "account is returned." Fugazy assured O'Neil that this was not American's intent.

160. On July 12, 1963 the President of Fugazy wrote the President of General Tire. In the letter he stated that Fugazy had been unable to complete arrangements with Aerojet and had been forced to close the offices that had been opened to service Aerojet. He felt sure that Fugazy could have served Aerojet, could have saved General Tire money, and could have contributed to RKO's advertising volume. The General Tire-Fugazy agreement in Akron had resulted in what promised to be successful operation for Fugazy. In the case of Aerojet, Fugazy lost over $25,000. The difficulty he attributed to Aerojet, "In all my years in the travel business, I have never seen more intrigue and deception. . . . I am truly embarrassed at your fine organization and our own would have our names associated with such intrigue and foul play." The letter continued with: an expression of doubt as to whether the situation could be salvaged; an observation that General Tire owed Fugazy an obligation; and an expression of confidence that corrective action would be taken. A letter to the President of Fugazy from the President of General Tire dated September 4, 1963, agreed to payment of $15,000 to Fugazy in "settlement." The letter expressed regret as to how things had turned out and hope was expressed that the future would develop mutual benefits. On September 9, 1963, the President of Fugazy wrote Ragsdale. The letter made the following points:

Fugazy had been informed that Hertz was definitely placing General Tire on its approved list; Fugazy would like to move its Akron office to a General Tire retail store; it would like to share profits in lieu of rent; in settlement of Fugazy's loss [$23,000 loss from the West Coast operation] it had been agreed that in addition to the $15,000 cash payment General Tire made, Fugazy would be under no obligation to buy RKO advertising until $8,000 had been realized in net profit from servicing General Tire; Fugazy proposed that a 60–40 profit split be accepted in lieu of rent after $8,000 in profits had been realized by Fugazy; in a special arrangement with Hertz, Fugazy was to get an additional 5% above the 20% reduction given the General Tire complex business, which in volume was in the vicinity of $500,000. The over-ride income would be credited to the Akron office thereby making possible an immediate $25,000 source of income. Such an arrangement would involve mere paperwork routine.

161. On September 25, 1963, Ragsdale wrote the President of Fugazy thanking him for the help he had apparently given General Tire with Hertz Corporation. The letter went on to discuss the proposal that Fugazy locate in General Tire's Akron retail store. A dim view was expressed of the proposals to split agency profits in lieu of rent and to share in the over-ride Hertz was to pay Fugazy on General Tire business. The letter closed, "I don't feel we should enter into an agreement with you regarding the Hertz proposition but certainly do appreciate whatever help you can give us in cornering more of their tire business."

162. There is no evidence in the record that Fugazy ever purchased any time over KHJ–TV.

General Electric Company

163. On February 26, 1962, Wilke wrote to R. D. Moore, Director of Trade Relations, General Electric. The body of the letter reads as follows:

> Confirming our conversation, the locations and types of our several broadcast facilities are as indicated below.
>
> I would certainly appreciate your mentioning to Marty King in Cleveland that RKO General is a division of the General Tire Company. I am sure an awareness of the mutually beneficial association between General Electric and General Tire will be helpful to us when Marty is directing the placing of his radio and television schedules.

164. General Electric spent no money on advertising with KHJ–TV between December 1962 and 1964. Between January and November 1965 it spent $5,100.

Hercules Powder Company

165. Hercules is a supplier of General Tire. In 1963 Ragsdale approached the company to buy time over RKO stations. He was told that the only such purchase in which Hercules would be interested was over RKO's Memphis station, WHBQ.

166. There is no evidence that Hercules made any purchase of advertising from any RKO station as a result of Ragsdale's solicitation.

Hertz Corporation

167. A Trade Relation and Customer Information Report of General Tire on Hertz contains an entry dated July 19, 1961:

JBF to JGR [Filson to Ragsdale]—presently using National 45%, Hertz 35%, and Avis 20%. Are considering entering into a national agreement with one of the agencies. Do you have any preference?

Another entry dated July 31, 1961, reads:

JGR to JBF—we do business with all three. Probably get more tire business from National but would have no particular interest with which company you made a nat'l agreement. Don't understand your purpose in making a national agreement when you get the same price from all.

Thereafter appear a number of entries relating to the Hertz-General Tire relationship including one dated July 13, 1962, which in pertinent part reads:

* * * They have agreed to all things we requested and to see that we get much larger share of their business however everything is being held up until our price is adjusted. * * *

In a letter dated August 24, 1962 from Trenner to Filson the following item appears:

I don't think it is necessary to rehash the Hertz deal which represented some of your efforts while at Aerojet and some after you had been transferred to Trade Relations. These people have been important radio and TV customers to us during the past fiscal year, and we can expect more business from them upcoming.

168. During the following years, these amounts were spent by Hertz over KHJ–TV: 1962—$63,550; 1963—$90,025; 1964—$20,400; 1965—$9,350; 1966—$15,210.

Humble Oil and Refining Co.

169. Some time in the early 1960's Ragsdale contacted his trade relations counterpart at Humble Oil, Edward V. Dorr. This contact was not considered by Dorr as pressure but one common in any business relationship. Dorr had had prepared a list of RKO facilities and the amounts Humble had spent with them. He referred Ragsdale to the Humble advertising agency. Ragsdale had RKO people call on the agency. Ragsdale then asked Dorr to notify the advertising agency of his interest. Dorr notified both the agency and Humble's advertising department of his interest. His interest was, if possible, to have RKO time purchased. Ragsdale later told Dorr that RKO was negotiating business with Humble's advertising agency and that while they were in good shape elsewhere they might have difficulty in Los Angeles and San Francisco. Dorr then sent a letter to Humble's marketing headquarters to the effect that it would be appreciated "all things being equal on quality and price, etc." to have RKO strongly considered since it is "presume[d] these folks are owners of good stations."

170. There is no evidence that Humble made any purchases from KHJ–TV as a result of this negotiation.

Langendorf Bakery

171. In 1962 Trenner suggested to Filson that if General Tire's subsidiary Aerojet changed suppliers of bread for its cafeteria, there would be created an advertising potential of $50,000. Langendorf had been purchasing time on KHJ–TV and in the year the statement was made had spent some $9,000 with the station. Filson checked on the matter. He found that the bakery then supplying bread to the cafeteria had, during a six month period, bought $50,000 worth of General Tire's

tires. Filson countered by asserting that Langendorf had spent $20,000 annually at KHJ–TV and KHJ–AM. Later the Aerojet cafeteria did buy some bread from Langendorf.

172. The record does not disclose the impact of Filson and Trenner's efforts on KHJ–TV sales to Langendorf. Purchases of advertising time by Langendorf from KHJ–TV between 1962 and 1966 ran as follows: 1962—$8,860; 1963—$8,675; 1964—$10,500; 1965—None; 1966—$3,300.

Lyon Van and Storage Co.

173. In 1963 Lyon used General Tire tires on it vehicles. General Tire recommended Lyon, among others, for use in moving General Tire employees from place to place. In the fall of 1963 Filson met with Lyon's General Sales Manager. In early 1964 he was told by a Lyon official that Lyon planned to place $30,000 in business with KHJ. Later in 1964, an official of Lyon gave Filson the dollar amount of purchases Lyon had made from General Tire in 1964 and estimated a future 50% increase in purchases, and mentioned some $11,000 to be spent with KHJ.

174. There is no evidence of what, if anything, was spent or was to be spent by Lyon on KHJ–TV as distinguished from KHJ–AM. Further, there is evidence that the $11,000 contract to which the Lyon official made reference may have been cancelled.

Olin-Mathieson Co.

175. A Report of Call dated April 30, 1963, written by J. W. Fleck of Union Carbide and circulated to six Union Carbide officials, covered an interview between Fleck and D. A. Kepler, Director of Purchasing for General Tire and Rubber. The report began by noting that Kepler had disclosed further details of a General Tire deal on polyols with Olin-Mathieson. These were the details listed by Fleck:

> (1) Agreement between General and Olin is verbal; not written.
> (2) Basis for agreement is Olin's purchase of Radio and Television advertising from General's RKO affiliation.
> (3) General have agreed to make a minimum dollar purchase of polyols. We think this probably is an exchange of dollars on a fixed ratio in return for a fixed amount of advertising dollars.
> (4) There is no definite duration for this agreement.

The memorandum went on to say that he and the General Tire Purchasing Agent commiserated with each other over the lack of polyol sales made by Union Carbide to General Tire in view of the fact that Union Carbide furnished a qualified product. The General Tire agent ordered a list prepared of what Union Carbide could furnish General Tire and indicated that later a forecast would be furnished of what purchases during 1963 General Tire could make from Union Carbide. Assurance was furnished that advice would be sought from General Tire's President (after he had returned from Europe) to see if the Olin deal was flexible enough "to lower the Olin polyol commitment in view of General's reduced consumption." In summary, the letter went on to point out, the General Tire purchasing agent was sympathetic to Union Carbide and a Union Carbide official would investigate the advertising situation.

176. Earlier in the year, on January 23, 1962 the President of General Tire sent to the President of Olin-Mathieson a letter which in pertinent part read:

> I want to thank you very, very much for the hospitality you showed Sam Salem, Bob Wilkie, and myself last Thursday. It was a real pleasure meeting you and the other members of your organization.
>
> I am sure that our two companies will get along very well in our new relationship. It should be mutually profitable. As a matter of fact, from now on I'll never mention a rebate on my shotgun.

177. Olin-Mathieson purchased no advertising from KHJ–TV between December 1962 through 1963. In 1964 it spent $12,350 with KHJ–TV. From January to November 1965 it made no such purchase.

Pepsi-Cola Company

178. On August 1, 1962, an oilman from Oklahoma, Walter Duncan, who also had a Pepsi-Cola bottling plant, following a conversation with the Chairman of the Board of General Tire over working out "something" of mutual advantage to Pepsi-Cola and General Tire, wrote Wilke a letter saying he would like to arrange a meeting between Wilke and the Executive Vice President of Pepsi-Cola, or his representative, to explore the matter further.

179. On August 14, 1962, Wilke wrote to Duncan that such a contact had been made: a luncheon was planned; the General Tire plant manager in Waco, Texas, had been contacted on behalf of Pepsi-Cola; word was that Pepsi was sold at the plant but employees demand favored Coca Cola; it might be that if there were more frequent deliveries of Pepsi-Cola to the plant more Pepsi-Cola would be sold; the General Tire plant manager had been alerted to General Tire's interest in Pepsi-Cola; Wilke would be happy to discuss with Duncan's dealer what could be done to get more Pepsi-Cola business at the General Tire plant.

180. By letter dated August 22, 1962, Wilke sent a list of General Tire plant locations to a Pepsi-Cola Vice President, Charles N. Baker, and asked that he be called so that "we can further discuss the continuation and expansion of a mutually beneficial association between our respective companies." On September 21, 1962, Wilke wrote the Chairman of the Board of General Tire reporting that he had met with Baker and had discussed the possibility of Pepsi's expanding use of General's broadcast facilities in conjunction with exposing General Tire employees to Pepsi-Cola. On October 15, 1962 Baker furnished Wilke a status report on the use of Pepsi-Cola and Coca Cola at General Tire plants. By memorandum dated November 6, 1962 to an RKO official, Wilke stated:

> . . . As a result of some recent reciprocal arrangements, we should in the future share to a greater extent in the Pepsi Cola spot campaigns where the RKO stations are involved.

This same report indicated that Pepsi-Cola's advertising agency and its owned and franchised bottlers had been advised of Pepsi-Cola's "desire in this respect" and suggested that a good RKO salesman contact the Pepsi-Cola account executive at its advertising agency. On November 12, 1962, an assistant to Hathaway Watson reported that he had

104–019—74——15

advised all [RKO] station sales managers of the General Tire-Pepsi-Cola "situation" and indicated that contact would be established with Pepsi-Cola's advertising agency. On November 20, 1962, Wilke sent the following letter to the manager of General Tire's Waco plant:

I understand that someone from Akron has been in touch with you regarding our interest in Pepsi-Cola. Tom O'Neil has asked me to follow thru and thank you for any help you have given or will give the Waco Pepsi-Cola dealer in exposing his product in your plant.

In addition to Tom's personal interest in this set-up we are in the process of developing considerable radio and television business from the Pepsi-Cola Company here in New York and would in turn like to reciprocate by helping them obtain more business from the various General Tire Plants.

The Pepsi-Cola Company here has assured me the Waco bottler is now prepared to furnish your operation excellent service and attention, and any help you can give him will work to our advantage in our own radio and television business.

On December 12, 1962, RKO's National Sales Director wrote Wilke saying that the Pepsi advertising agency has been "pressured" to use RKO stations and that all "Sales" could do was to "stay on top" and continuously remind the advertising agency of the Pepsi-Cola-General Tire "relationship."

181. In a Pepsi-Cola inter-office memorandum from Baker to a Roland Ball in Memphis, dated January 7, 1963, Baker stated:

Some time ago Bill Durkee established a very fine rapport with General Tire and Rubber Company through their President and major stockholder, Tom O'Neill. As you know, this is a very large company with much diversification, owning besides their basic tire business, electronic development plants, theater chains and TV and radio stations. Bill asked me to work with O'Neill's assistant, Robert Wilkie, to get all the extra business from these diversified activities that could be developed. In return we were to encourage our bottlers to use the various radio and TV stations owned by General Tire as much as possible.

The memorandum concluded with notations of a complaint made by Wilke that RKO was not getting the cooperation that had been expected from Pepsi-Cola in regard to Station WHBQ, Memphis. The memorandum got response from a Memphis Pepsi-Cola bottler to the effect that WHBQ was getting a lion's share of their advertising business, some $21,000 out of an $82,000 budget.

182. In a letter to a Pennsylvania Pepsi-Cola bottler Baker wrote in pertinent part:

Walter Duncan, who owns a number of Pepsi-Cola bottling companies including Oklahoma City, his home town, is an old and intimate friend of the O'Neil family who practically own General Tire and Rubber Company. In pursuing this relationship it was discovered that among the properties of General Tire, who as you know are quite diversified, was a chain of television and radio stations. Further investigation showed that our bottlers collectively were spending sizable sums through these facilities. The net result was that a Robert Wilkie was assigned by the O'Neils to work with me in getting Pepsi-Cola representation in all installations controlled by General Tire *where feasible*. Bob Wilkie has the title of Assistant to the President. To date we have been making considerable progress.

183. On April 9, 1963, the RKO National Sales Director issued a memorandum to all RKO Station Sales Managers. It reads:

Sometime ago, I wrote to you informing you of the comments made on PEPSI COLA. I also gave you the names of who to contact in your specific area.

PEPSI COLA has now asked how we are making out with the various bottlers. Please let me know specifically the type of schedules you have secured and the kind of money . . . as far as you can determine, how much they are spending on your competition or anything else that would be helpful in reporting to the PEPSI COLA COMPANY.

On August 16, 1963, Baker wrote Wilke in pertinent part:

I put some pressure on our bottler in San Francisco to get him to put some pressure on his advertising agency in your behalf, and I would like to find out what this resulted in, if anything.

184. KHJ–TV's role in the above affair seems to have been minuscule. On April 23, 1963, KHJ–TV wrote a memorandum to RKO's National Sales Director, the body of which reads in its entirety:

KHJ–TV's only Pepsi spot business since acquainting B.B.D. & O. with our contacts has been as follows:

Last December '62 a one-week saturation and a very low cost per thousand went to KTLA.

Since then they have offered us the chance to bid for four half hour remote telecasts of races from Hollywood Park in June to July on Friday nights at 10:30–11:00 p.m. Had to pass—went to KTLA.

Proctor and Gamble

185. On March 30, 1962, Larry Murphy, Ragsdale's assistant, wrote the following memorandum to an accounts manager for General Tire Sales in New York City:

Before leaving New York Wednesday, I ran down the whole story on Proctor & Gamble and you will be happy to hear that they are the No. 1 advertiser with RKO-General.

This being the case, we will not attempt to switch any business from Proctor & Gamble to Lever Brothers and I think we should consider this to be a closed matter.

My suggestion as far as Lever Brothers is concerned would be that on any further business calling for materials supplied by either one of these people, I am sure our Purchasing Department would be more than happy to consider Lever Brothers.

186. Proctor and Gamble has purchased time on KHJ–TV. The record, however, does not disclose the impact, if any, on KHJ–TV business which may have resulted from the policy outlined in the second paragraph of the above-quoted language.

Riviera Manufacturing Co.

187. On January 29, 1962, General Tire's Vice President for Marketing, J. E. Powers, wrote Hathaway Watson to the effect that on a recent trip to Los Angeles he had met David Seigel, a sales promotion manager for Riviera, the largest manufacturers of convertible sleepers on the West Coast. Powers said that Riviera used General Tire's vinyl fabrics, spent considerable money on KHJ–TV, and did some business showing RKO movies. He stated that "[L]ike all of these people they want more time and are willing to spend a certain amount of money but not always the proper amount of money." Seigel had been informed that time rates were strictly up to Watson. Noting that Riviera could mean a million dollars a year in business to General Tire, and that Seigel had never been able to talk to Watson but only to salesmen, Powers asked Watson to call or write Seigel that he would be available for consultation in New York.

188. Watson forwarded Powers' letter to Trenner and asked for a fill-in. On January 31, 1962, Watson wrote Seigel that he would be on the West Coast in April, that if Seigel were in New York he hoped he would stop in, and that meanwhile if Seigel had any matters to take up with the station he could talk to the manager there, or to Harry Trenner.

189. On February 23, 1962, an intra-General Tire letter noted that Harry Trenner had asked that a check be made of the possibilities of a "co-op" advertising plan for Riviera.

190. On September 18th Trenner wrote Watson. Trenner said that there had been a meeting with Seigel, that Riviera does spend considerable money with KHJ–TV, that as a big user of General Tire products Seigel wants advertising assistance from General Tire. Seigel was promised nothing but was told effort would be made to see what could be obtained for him. Inquiry had been made as to what kind of cooperative advertising funds could be obtained for Seigel but no response had been forthcoming. Trenner closed the letter with the observation that he did not know what "co-op" funds were available to Seigel but that if General Tire could not do more for Seigel than Seigel could do for himself, RKO was in an unfortunate competitive position.

191. There is no direct evidence that Riviera ever obtained a cooperative-advertising agreement with General Tire or RKO. However, Riviera did spend the following amounts with KHJ–TV during the following periods: 1963—$12,000; 1964—$12,000; January–November 1965—$16,000.

Shasta Soft Drink Company

192. An RKO salesman in San Francisco wrote to Trenner inquiring about the chances of gaining distribution for Shasta Soft Drink in Aerojet's two large plants. He stated, "I sincerely believe KHJ, Los Angeles, will obtain a sustaining long term contract from Shasta if distribution is accomplished."

193. There is no evidence that Shasta was ever sold in Aerojet plants. There is no evidence that Shasta ever purchased any time over KHJ–TV.

Signal Oil

194. On November 15, 1963, Filson wrote Ragsdale a memorandum, the subject of which was identified "Signal Oil Company." In that memorandum Filson stated: (1) he had talked with a Bill McKenzie and a Jim Enright [Enright was with Aerojet] about renewal of a service station lease; (2) he had introduced one Ken Mundt to one Jim Phegley; (3) he thought it doubtful if Aerojet land was available for service station use but noted that Mundt had other leads; (4) he would arrange for Mundt and McKenzie to have a meeting; (5) Signal planned to have an advertising budget and McKenzie was on the committee to choose media; (6) though Signal uses an advertising agency they maintain control of advertising; (7) Signal does some TV advertising and considerable radio advertising; (8) he would arrange a meeting between Mundt and Trenner.

195. There is no evidence that Signal Oil purchased advertising over KHJ–TV.

Standard Oil

196. On August 23, 1962, Filson reported to Ragsdale that he had talked to Standard's Manager of Trade Relations in San Francisco. Filson reported that the "Truck Tire Contract" was still available to General Tire, but the "Advertising Contract" would not go through, due to lack of advertising funds. On September 25, 1962, Filson made a similar report stating that Standard was doing some advertising on RKO General and that on his next visit he would arrange for an RKO Advertising Manager to meet with Standard's advertising people.

197. Standard Oil has purchased time on KHJ–TV on a rather consistent basis. There is, however, no evidence that the Filson efforts referred to above resulted in any sale of advertising by KHJ–TV to Standard Oil.

United States Rubber Company

198. On December 4, 1964, Edwin D. Meade, Director of Commercial Relations for the United States Rubber Company, wrote Wilke a letter, the body of which reads:

> With regard to our telephone conversation I have discussed your interest, in any considerations for audio-visual programs of the type you mentioned, with Mr. Art LaCour of our Public Relations Department. He is aware of our business relationships and I am sure we will be glad to see your people at any time. He mentioned, in fact, that he expected a visit from your Mr. Canini this week.
>
> I also tried to reach Mr. Duncan Ross, in charge of Public Relations at our Naugatuck Chemical Division, but he was out of town and not expected until next week; but I will get in touch with him along the same lines as my discussion with Mr. LaCour.

199. The record shows that U.S. Rubber spent the following amounts with KHJ–TV: 1963—$18,220; 1964—0; January–November 1965—$8,450.

200. In addition to the foregoing incidents Fidelity also tendered a showing on trade relations in action between General Tire and Chemstran Co. and Sun Oil Co., as well as one involving General Tire and Bekins Moving and Storage Co. As with many other facts developed on this record, the facts on these relationships do not rise to that level of materiality as to justify their recitation in findings.

201. It might also be noted that a distinguished expert in the field of economics, Dr. Theodore J. Kreps, Professor Emeritus of Business Economics at Stanford, testified in this proceeding. Dr. Kreps deplored reciprocal trade arrangements between large corporations, as ultimately harmful to the nation's economy.

CONCLUSIONS

General Tire

1. Findings covered in paragraphs 22 and 23, above, show that the licensee is, in fact, one of the nation's large conglomerates. The parent organization, through its subsidiaries, manufactures a wide variety of products and furnishes for sale numerous services. On occasion, within the complex, lines of authority appear to be blurred, as in the case of

Hathaway Watson and John Poor (see paragraph 29, above). As far as the Commission is concerned, however, such problems appear singularly the conglomerate's own business for no part of KHJ–TV's case rests on the theory that the station's shortcomings are merely fallout from inherently inexplicable intra-corporate phenomena. As noted in paragraph 29, above, taking the stand at hearing were numerous General Tire, RKO, and KHJ–TV executives and subordinates. None sought to turn his back on the fact that KHJ–TV is licensed to RKO, that RKO is a subsidiary of General Tire and Rubber, and that the rubber company is responsible for, and accountable for, the acts of the television station. In the field of corporate regulation the target for assessment of responsibility is not always so easy to find. It is to the credit of the applicant for renewal of license that no such problem is here presented.

2. Findings covered in paragraphs 25–28, above, leave no room for doubt that General Tire, through its subsidiaries, has made significant contributions in the field of broadcasting, both at technical and program levels. Not the least of these contributions has been its responsibility for keeping the breath of life in experimentation with a whole new system of television broadcasting-subscription television (pay TV). Equally noteworthy was the company's presence in the vanguard of those who first cracked the motion picture producers' antipathy toward making their products available to television audiences. In assessing licensee qualifications, such contributions as those noted in the cited paragraphs are easily the subject of elision and it is easier to slough them off as accidental "spin offs" from a conglomerate's main mission—making money. The fact remains, however, that these accomplishments took time, effort, money, tenacity, and a measure of fortitude, that KHJ–TV's steward was responsible for them, and that America's technical competence and its culture have been advanced by them.[6] Only cynicism of a high order would deny that such contributions significantly enhance licensee qualifications.

3. Findings covered in paragraphs 38–39 show that KHJ–TV under General Tire had no bed of roses, financially, in getting started. That it did have initial financial difficulty is not surprising when it is remembered that the station did not, and does not have a network affiliation, and that the city in which it competes is not without considerable in the way of competitive mass communications media. The facts also indicate that the conglomerate's large financial resources stood the station in good stead during its operational loss period. Experience has shown that serious public interest problems can arise when a licensed facility attempts to limp along with inadequate financing. Applicant licensees, such as General Tire, tend to furnish built-in assurance to the Commission that they will not be plagued by such problems.

4. Findings covered in paragraph 52 show that if there has been an imbalance in KHJ–TV's programming as to type of programs, such imbalance, quantitatively at least, was kept no secret from the Commis-

[6] Some critical conclusions will be reached hereafter on KHJ–TV's employment of movies as program fare. Nothing there held, however, is intended to condemn motion pictures per se as a source of television programming.

sion. It will be noted that according to the breakdown set forth in those findings, the station, in all but two non-entertainment categories, exceeded in performance that which it forecast in its renewal application and in those, closely matched application prediction. It will also be noted that in the entertainment category, by including special language programs under entertainment, as was done in the application, the prediction of time to be devoted to entertainment is not far from that reported as actually spent on that type of program. A record of accurate reporting to the Commission is an earnest of good stewardship.

5. The findings covered in paragraphs 54–87 show that KHJ–TV is capable of conceiving, fabricating and presenting programs well suited to meeting the public interest standard. But, the station policies set out in paragraph 34 win for the station no Brownie points. It is no recommendation to KHJ–TV's qualifications that it has so supinely bowed out of competition with network news. Contrary to what appears to be the station's rationale, network news is not the alpha and omega of television news programming. One would think that a station so richly endowed with broadcasting resources, experience, and financial backing would, if the public interest were in fact the touchstone of its operation, welcome the challenge of competing in a field where it apparently believes there is so much excellence. Its policy of non-interference in serving audience needs, when it believes some other station is serving those needs, viewed in connection with KHJ–TV's record here, suggests that the policy is merely a euphemism for one that dictates dedication of a majority of the station's air time to service of the young, the congenitally gullible and those not very bright. The policy then, in fact, directs the station's programming to an already well served group, and because it does and because it is disingenuous, it can only be held to fault licensee qualifications. The policy of not presenting editorials runs squarely athwart Commission policy. The Commission assesses demerits for failure to editorialize, see *WHDH, Inc., et al.*, 16 FCC 2d 1, at 10 and 12–13, 15 RR 2d 411, at 425 and 427: Memorandum Opinion and Order denying rehearing, etc., 17 FCC 2d 856, at 859, 16 RR 2d 185, at 190.

6. The facts set forth in paragraph 30, together with those set out in paragraphs 24 and 54–85, support a conclusion that the licensee of KHJ–TV is a broadcaster of many years' experience, having numerous and far-flung broadcast holdings and one fully competent to present, over its facilities, a variety of programming well designed to serve the public interest.

7. The findings set forth in paragraphs 31–37 and 42–51 suggest that KHJ–TV is a large, well-organized operation manned at the supervisory level by experienced, well-trained and doubtless able men. Basic policies of the station are established at the headquarters of General Tire. Like most companies that have multiple broadcast holdings, General Tire has a policy of seeing to it that its broadcast station personnel are active in local civic affairs. These associations, on the part of KHJ–TV personnel, have, on occasion, resulted in suggestions concerning programs to be presented over the station. Moreover on occasion such suggestions have contributed to programs being presented.

8. Facts in paragraph 87 show that General Tire is not averse to increasing the expenditure of money for programming. Those shown in paragraph 88 indicate that KHJ–TV has won a measure of success in increasing audience during non-prime viewing hours. Those shown in paragraph 89 establish that there are a number of people in the Los Angeles area that speak well of the station.

9. Most damaging to General Tire as a licensee are the facts set forth in paragraphs 91–97. KHJ–TV is licensed to serve the public interest. That it is located in a community that teems with talent and has its full share of social, economic and political problems are facts that can be officially noticed. That the public's spectrum space is in short supply is a fact so well known as to forestall discussion. Yet in light of all those considerations the cited paragraphs show that an inordinate amount of time was devoted by KHJ–TV to a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, hour after hour, day after day, week after week, month after month, year after year, *ad infinitum ad nauseam*. To hold, and such is the holding, that this kind of air-time utilization does not serve the public interest is an exercise of restrained understatement. Such air use by a station serves well the interests of the station and the advertiser. As the record amply demonstrates, it barely touches service to the public, much less service in the public interest.

10. In arriving at the foregoing conclusions full attention has been accorded the fact that besides old movies and commercial announcements KHJ–TV has also presented other packaged program material and some material that the station actually produced. By and large this material has been thoroughly described in paragraphs 54–85, above. As already noted, much of the material set forth in those paragraphs appears well designed to serve the public interest. But, it cannot serve to catapult KHJ–TV's record into one of service in the public interest when viewed against its interminable use of old movies and commercial announcements for the bulk of its program fare. One swallow does not make a summer, good tires do not make a good automobile, a good appetizer does not make a good meal, and a modicum of public interest programs does not make a public interest operation.

11. Within the facts of record are those contained in paragraphs 98–111. They deal with KHJ–TV's presentation of movies featuring crime and violence. In the conclusion reached immediately above, the Examiner felt singularly free of First Amendment restraints. The rationale there varies little from what might have been employed had the station chosen to take itself off the air the majority of the time, or if General Tire, entirely bereft of its senses, had chosen to employ KHJ–TV for the sole purpose of running a film on the manufacture of automobile tires. The facts referenced immediately above, however, since they do not present a handle for quantitative analysis, do present something more in the way of First Amendment problems. Moreover, it is no business of the Examiner to initially pass on the sticky problem of crime programs over television and its attendant whether-when-and-why corollaries. But this much may unquestionably be concluded. KHJ–TV did present many movies which featured crime and violence.

It not infrequently carried such shows more than once. A respectable and substantial body of community opinion, in unmistakable terms, voiced disapproval of its presentation of the shows in the way that it did. Their disapproval fell on deaf ears. The protests of a viewer's group and a church group appear to have been met only by a gratuitous exhibition of arrogance (see paragraphs 107, 108, 111). Even a protest by a Member of Congress appears to have been treated with scarcely greater respect (see paragraphs 109–110). The licensee attitude thus reflected does not measure up to that sense of licensee responsibility to the public the Commission has a right to expect from those whom it franchises.

12. That movies featuring crime and violence were not the only aspects of KHJ–TV's programming about which many members of the public took a dim view is also amply demonstrated by the facts here under consideration. In paragraph 103 are summarized the findings of a professional organization based on a scientific sampling of public opinion concerning the program side of KHJ–TV's operation. Out of numerous program categories covered by this survey, only as to movies did the report show the station to be anything much more than a subject of apathy to its audience. In paragraphs 104 and 105 are detailed facts which show that an organization of knowledgeable and concerned viewers cited chapter and verse on a wide variety of program shortcomings. In paragraph 112 (the negative counterpart to paragraph 89) is digested testimony of a group of people who do not speak well of the station. Not unmindful that as heretofore noted, KHJ–TV has presented some programming directed at the public interest and that some members of its audience speak favorably of the station, the weight of the evidence clearly points to a conclusion that, wholly apart from the subject of crime shows, the station fails by a good deal to enjoy the respect and support of the audience it serves.

13. The foregoing conclusions cover the facts of record concerning the applicant for renewal of license, RKO General, Inc., up to the close of the first phase of hearing. In the interest of coherent conclusions, the facts developed at the hearing's second phase, concerning the trade practices of General Tire and the import and application of those facts to the qualifications of the station here at issue, are best assessed now, rather than deferring their consideration until after conclusions are reached on the facts covering the qualifications of Fidelity Television, Inc.

14. The facts set forth in paragraphs 126–199 leave no room for doubt that General Tire does engage in a trade practice that falls well outside conventional concepts of sale and purchase. The practice involves the parent company's buying and selling goods and services on behalf of itself as well as on behalf of its subsidiaries. Sales and procurement personnel of the parent company, or its subsidiaries, play no substantial role in the practice. Rather, it is effected by a group of specialists out of parent company headquarters. These specialists are equipped with data on the trade records of the companies with whom they negotiate. Particularly are they equipped with information on the sales and purchase records of the concerns with whom they negotiate vis-a-vis General Tire and its subsidiaries. The practice is

called "trade relations." It does not appear to be a practice unique to General Tire. As practiced by General Tire, it involves many facets of the company's far-flung holdings, including its broadcast interests which, of course, include KHJ–TV. "Trade relations" with General Tire demands a good deal of effort and undoubtedly a good deal of talent in the art of persuasion. The theme of the practice is "you buy from me—I buy from you." Although there is evidence that some employees of General Tire may have employed such language, the record here does not support a conclusion that express threat of refusal to purchase forms any part of General Tire's "trade relations" practices. Generally, but not always, "trade relations" is carried on by General Tire with other large concerns or conglomerates. The ethos of this latter group does not embrace internecine strife simply because none in it are the least bit interested in vying for Pyrrhic victories.

15. From the standpoint of licensee qualifications, the fact that KHJ–TV is involved in its parent company's "trade relations" suggests several licensee qualification disabilities. *First*, on its face, relegation of the end product of a government licensed public service operation for use as small change in inter-corporate deals is *infra dig* such an operation. The rationale here used is the same that keeps laxative ads from flying atop the Washington Monument and public officials from endorsing commercial products. *Second*, the removal of competition from the comparative openness of the broadcast market place to the mysterious marts of inter-corporate exchange creates serious competitive difficulties for those without access to those marts. Many of the nation's largest advertisers are conglomerates and all, in one way or another, trade with conglomerates. How does a station whose only business is broadcasting go about satisfying a prospect whose interest, when placing an advertising contract, lies not only in reaching audiences but also in such disparate subjects as the sale of bread to cafeterias, the sale of insurance to groups, the sale of synthetic rubber components to a tire manufacturer, or the sale of soda pop to an industrial plant? The question asked is of course rhetorical. No independent broadcaster can hope to compete in such areas. But KHJ–TV can. It is just such multiple interests that the trade relations practice of General Tire embraces. Throughout its history the thread of concern over the independent broadcaster runs through the fabric of Commission policy. Is it not then only fitting that a considerable measure of disapprobation be assessed against a licensee involved in a practice so damaging to the competitive position of the independent broadcaster? *Third*, in paragraphs 122–125, above, there is a discussion of the continued and continuing surrender of air time to the largely private use of licensees and advertisers, while there may be a small group of people in the country that view this development with equanimity and an even smaller group that view it with glee, the Examiner is convinced that most of the public is concerned over it and many are hostile to it.[7]

[7] The Examiner must proceed on conviction. In an industry much preoccupied with polls, samplings and surveys, there is a singular dearth of data on the public's reaction to the amount of time devoted to commercial advertising over the air. In over 20 years with the Commission during which time he has read the results of innumerable studies measuring the public's reaction to various facets of broadcasting, he has no recollection of having read one that reported response to the simple question, "Do you believe there is too much advertising over the air?"

Now if the Examiner is right in this premise, then the trade practices of General Tire present further grounds for concluding that as a broadcast licensee that concern's qualifications are suspect. With the vast array of machinery for getting rid of air time for advertising purposes that already exists in the broadcast industry, one would think that there is hardly a potential advertising dollar in the nation that could escape the sweep of that machinery. Not so. We now learn, through this record, that advertising is also disposed of by this conglomerate licensee at a level to which the ordinary machinery of broadcast sales cannot reach. It is unnecessary to commiserate over the impact this force has on the machinery. The machinery can stand the shock. But, it is important to recognize that this force does create a unique pressure, and a wholly unnecessary pressure, for enlargement of the amount of television broadcast time that is devoted to commercial continuity. It is no accident that KHJ–TV has the kind of permissive commercial policy that it has. See paragraphs 91–92, above. *Fourth*, the trade relations practices of General Tire tend to stultify incentive to good programming. What stimulus is there for station ownership, management or personnel to expend energy and risk shrinking ownership's purse, in attempting to program a station in meritorious fashion, when all concerned know that the advertising with which the programming is to be associated can be disposed of through inducements largely irrelevant to program quality? To say that under such conditions all incentive to good programming vanishes, may be answering the question with overstatement. To say, however, that the force of stimulus is blunted, is an answer which not only the character of KHJ–TV's programming bears out, but one that is confirmed by the approach taken to programming by General Tire's trade relations people. In this latter connection reference may be made, for example, to the Equitable Life Assurance incident, paragraphs 146–158, above.

Fidelity

16. Facts set out in paragraph 113 show Fidelity Television, Inc. to be composed of 18 stockholders. Twelve live in Los Angeles or its environs, one lives in San Francisco, and five live in Orange County.

17. Facts set out in paragraph 114 show the stockholders of Fidelity to be virtually free of any ownership interest in any means of mass communication.

18. Facts set out in paragraph 115 show that persons representing 22.68% of the stock of Fidelity would be employed full time at the planned station. Those facts also show that persons representing all but a nominal amount of the remainder of the stock would spend some time at the station or on station affairs.

19. Facts set out in paragraph 116 show the Fidelity stockholders to be busy businessmen, who collectively represent substantial activity in, and contributions to, a host of civic and professional organizations and affairs.

20. Facts set out in paragraph 117 show that Fidelity claims, as motivation for filing its application, the following considerations: There are 11 television channels allocated to Los Angeles; there are more people living outside Los Angeles but in the same general area

than reside within the city; the greatest growth area lies around Orange County, an area considered by the Census Bureau as one separate and apart from Los Angeles; Los Angeles stations are oriented toward big advertisers; a substantial survey conducted by Fidelity through phone calls, letters and meetings indicated that KHJ–TV, of all television stations serving the area, did the least in the way of public service and was notorious for presenting old movies and an excess of advertising; Commission policies appear to favor diversification of media and integration of ownership with management; conglomerate licensees cannot provide a full measure of public service because of responsibility to stockholders; conglomerate licensees cannot reflect integration of ownership with management.

21. Paragraph 118 shows that Fidelity proposes to move the KHJ–TV channel to Norwalk, California (population 88,000), a city 15 miles southeast of Los Angeles, and also locate an auxiliary studio in Anaheim, California (population 104,000). For what it may be worth, as a conclusion, the fact might also be noted that Fidelity would attempt to use some of the present KHJ–TV equipment were it to succeed here (see paragraph 119, above).

Comparison

22. Before final evaluation, it should be initially noted that the Commission in its order of designation made clear that a hearing involving a contest over a renewal of license presents different problems than do ordinary comparative hearings. It further stated that it had reached no determination as to the weight to be accorded various factors of difference between competitors for a license renewal. It also suggested that the parties in this hearing should feel free to urge any arguments they deem applicable concerning the weight to be accorded evidence bearing on significant factors of difference (see paragraph 2 of the Preliminary Statement, above). It is in the spirit of such language that the following evaluation is made.

23. The present licensee of the station is one of the nation's large conglomerates. That fact has not, however, impaired its answerability as a broadcast licensee. It has vast broadcast holdings. Those holdings, however, are widely dispersed and are located in areas where they have to compete vigorously for the public's eyes and ears. There therefore seems little chance that by reason of General Tire's broadcast interests the public, either in and around Los Angeles or elsewhere, is dependent upon a diet of that company's views and ideas for the intellectual nourishment that is obtainable from mass communications media. The operation of the station is directed and manned by highly experienced and competent personnel. Behind these men stands an organization that is rich in assurance of financial ability, has made significant contributions to the art of broadcasting and is one that, as far as this record is concerned, has a good record of accurate reporting to the Commission. That the combination of conglomerate leadership and station staff is capable of formulating and presenting individual programs that serve the public interest is a fact the record makes unmistakably clear. The trouble with General Tire's stewardship of KHJ–TV is that, in the overall, its on-the-air

operation miserably failed to serve the public interest. This ultimate fact the record also establishes unmistakably. It could well be said of General Tire at KHJ–TV that it "could" but "wouldn't" or "didn't." Why it chose to thus operate the station is of course a question that is locked in the breast of General Tire's management. A good guess would be that with a myopic eye on the dollar it decided "formula broadcasting" would "get by" because the station would never be called to account.[8] If that was the rationale behind the policy that has brought the station to the brink of loss of license, about the kindest thing that can be said of it is that it evinced considerable naivete concerning the stability of regulatory policy.

24. In addition to General Tire's bad record of programming KHJ–TV, it also labors under the disability of having involved the station in a business practice that does not square well with the basic standard under which the station operates. That consideration has been discussed above and it is not to denigrate its importance to say that it requires no further treatment here.

25. The foregoing comments will serve to outline General Tire's non-comparative posture. What of Fidelity? Its stock is owned by 18 apparently successful and public-spirited businessmen. None have any substantial interest in media of mass communications. All but one lives in the Los Angeles general area and five live in Orange County. Behind the Fidelity application stands a very comprehensive survey and sampling of public opinion indicating that the locale in which Fidelity would operate its station is well populated, that many people in that area believe the Los Angeles television stations neglect their needs and the needs of the communities in which they live, and that KHJ–TV is the worst television station that purports to serve them.

26. The considerations noted in the paragraph above constitute formidable licensee recommendations for Fidelity as against General Tire. They do, however, require a little comment.

27. While there can be no question that as against General Tire the local ownership characteristics of Fidelity are superior, it should be noted that those qualities do not reach optimum proportions. None of the stockholders live in either Norwalk or Anaheim, the locations of the Fidelity proposed station and its auxiliary studio. If residence identification with a community begets all the public interest advantages that are held out for it, considering the healthy rivalry between communities that is so much a part of the American scene and the Commission's well known requirement that stations are first responsible for serving the communities in which they are located, it would be more reassuring if all of the Fidelity stockholders lived within the city limits of either Norwalk or Anaheim. As far as the diversification-of-the-media-of-mass-communications criteria is concerned, Fidel-

[8] The formula referred to is as old as time. There have been many practitioners of it, including Phineas T. Barnum and Texas Guinan. One of its most colorful exponents was the western "medicine man". He rolled into a frontier town, bought a round of drinks for the boys at the bar, gave the Sheriff a couple of cigars, called out Little Sheba and went into his pitch selling his own particular brand of snake oil. Modern broadcast counterpart would call for these changes in casting and properties: Boys at the Bar . . . the so-called "Discriminating Audience"; the drinks . . . news, information and some quality entertainment: The Sheriff . . . The Commission; the cigars . . . the station's nod to the Commission's reporting requirements and program policies. Only nominal changes need be made for Little Sheba and the pitch of the medicine man.

ity gets a solid preference, hands down. General Tire has many such media, Fidelity represents virtually none. If the Commission is going to employ its "sudden death" rationale here and hold that any comparative superiority enjoyed by General Tire does not outweigh the comparative advantages adhering to Fidelity because of the latter's freedom from ties with other media, see e.g., *McClatchy Broadcasting Company*, 19 FCC 343 at 381; 9 RR 1190 at 1220k, then the Examiner ought to close the book here now and move on to the ordering clause. But, it is too well known to require citation of authority that the Commission's concern over media diversification, as far as implementation is concerned, is a sometime thing, and, the Examiner is not clairvoyant. He is, accordingly, emboldened to go on. To him the most solid preference that Fidelity enjoys stems from the fact that its proposal is backed by a comprehensive sampling for public opinion. Even this preference is subject to some reservation. To avoid laboring a subject that could take pages of exposition, the reservation may be simply stated with these questions. Is it consonant with national policy to further contribute to the city of Los Angeles' becoming the hole in the doughnut of its surrounding communities? Are we now embarked upon a program of scrapping the allocation scheme that was so painfully worked out by the Commission's Sixth Report and Order?

28. Once it clears the easy (for it) hurdles—local ownership, media diversification and public opinion—Fidelity does not look too good. Attached to its qualifications are no experience in the field of broadcasting, no contributions to the art, no proof through the school of experience of licensee answerability for stewardship, no proof, through the same school, of ability to stand the shock of adverse financial conditions, and no demonstrated ability to conceive and present programs of high quality.[9]

29. Even under the so-called integration-of-ownership-with-management criteria Fidelity looks bad. The facts shown in paragraph 115 indicate that two stockholders are going to work full time at the station, that eight are going to work there from 5 hours to 20 hours a week and that six are going to sit on what appear to be working committees. There is no evidence that any of these people have experience in broadcasting. All, however, carry employment titles bearing supervisory connotations. If Fidelity is serious about its proposal, it is projecting an operation that will, at best, be signalized by confusion, and, at worst, by chaos. The station is to have a competent paid staff. Of this we can be sure or staffing would have been placed in issue. It boggles the mind to imagine what is going to happen when a competent staff finds itself supervised, advised, led or guided (or whatever directors, coordinators and committeemen do at a television station) by, roughly, a score of men, wholly without experience in broadcasting, whose efforts would, for the most part, be only sporadically expended. It is just as easy to believe that the torts, crimes, property and

[9] It is certainly no compliment to Fidelity's qualifications that it was unable to get its program proposal into evidence. The announced purpose of the Commission's exclusion of program showings from evidence is to keep records free of "immaterial clutter." See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 at 397, 5 RR 2d 1901 at 1912.

corporate work at the law offices of the Messrs. Simon, Medvene, Sheridan and Murphy might be effectively directed by the part-time efforts of a few television men who happen to be members of the bar, as to imagine that the kind of managerial setup Fidelity proposes here would ever work at a television station. Proposals such as this are susceptible of two interpretations that should not be shrugged off. Either the proponents honestly believe that operation of a television station, unlike any other enterprise, can be effectively directed by an inexperienced group on a part-time basis, or they advance the proposal for show purposes only without intention to effectuate it. Neither inference is very palatable. The former suggests witlessness. The latter raises questions as to the advisability of entruting stewardship to those who would attempt to fob off on a licensing agency such a tall tale. Once this latter question is raised, the whole problem of applicant credibility is presented and one begins to wonder if the Fidelity application is really advanced for the purpose of operating a television station in the interests of the public and the audiences in and around Norwalk and Anaheim, California, or, is the application merely a bid to wrest a license away from a vulnerable holder with the intent to dispose of it at the first opportunity, and in the process reap windfall profits out of slight investment. The Examiner, though not personally purged of suspicion, cannot, in good conscience, draw such a conclusion. The Commission's policies favor integration of ownership with management. The Fidelity application was, of course, tailored with the Commission's policies in mind. There is no direct evidence in the record that Fidelity does not intend to try to effect its integration proposal. It is conceivable that with some kind of "consensus of opinion" goal in mind it will attempt to bumble through initial operation with the kind of managerial congeries the proposal contemplates. Accordingly, Fidelity is held to squeak out of its integration proposal with only a demerit for having advanced such a foolish bit of business.

30. Turning finally to the matter of comparison, it is apparent that the record presents a mixed bag of considerations. They all, however, boil down to this cold hard fact—on the basis of the record, neither applicant is any bargain as a broadcast licensee. Both have serious shortcomings, General Tire's perhaps the more serious. Moving to the stable for analogy, the choice between the two applicants might be likened to selecting between a race horse with acceptable blood lines, good conformation, demonstrated ability to achieve speed, and an unbreakable habit of jumping the track and galloping off to the feed bag, against the chance to acquire, sight unseen, a Chincoteague pony. We live in an imperfect world, however, and the Examiner's job is to make a choice. He will, without much enthusiasm, go with Fidelity Television, Inc. He will do this, primarily, because of KHJ–TV's poor record and, secondarily, because Fidelity does have marked superiority over General Tire in the areas of local ownership, diversification of mass communications media and favorable survey and poll support. All of these latter factors the Commission sets great store by. Although General Tire has an unmatched record of experience and latent competence, these factors have never, and do not now,

loom very large among the Commission's reasons for granting preference to one competing applicant over another, see e.g., *McClatchy Broadcasting, ibid.*, and *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 at 396 and 398, 5 RR 2d 1901 at 1910 and 1912–1913. Further, the Commission's comparatively recent decision in *WHDH, Inc.*, 16 FCC 2d 1, 15 RR 2d 411, stands as the only contemporary precedent governing the disposition of competing applications for renewal of television station licenses. While the facts in *WHDH* vary somewhat from the facts here, the decision, viewed in its entirety and measured against these facts, leaves little room for doubt that it stands for the proposition that the present licensee of KHJ–TV ought to be replaced by Fidelity. Before making that recommendation, however, the Examiner would like to make a few final observations.

31. Like any corporate licensee, when it took franchise for KHJ–TV, General Tire assumed dual and conflicting obligations. On the one hand it had an obligation to serve the public interest, on the other an obligation to serve the financial interests of its stockholders. Without in any way backing off from what has been here found, that at KHJ–TV it did an inadequate job of reconciling those conflicting interests, it must be acknowledged that it was not aided much in the task of reconciliation by any clear and understandable requirements governing a television station's on-the-air operation. That General Tire could run a good, even excellent, public interest television operation in Los Angeles is a proposition the Examiner is, on the basis of this record, perfectly willing to accept. That General Tire ever would, in the absence of rules setting minimum standards for air-time utilization, long engage in any such operation is a supposition he is unwilling to accept. It seems to the Examiner that this record amply demonstrates that the imperatives of General Tire's obligations, to stockholders, unchecked by countervailing demands on behalf of the public, have constituted an insurmountable obstacle to its engaging in a public interest operation. But there is no evidence that the company is a compulsive law breaker or scofflaw. Quite the opposite, the record indicates that the company has considerable machinery for keeping its operations within the law. The Examiner cannot help but believe that had there been standards governing air-time utilization, the station would not have breached them. As bitter a pill as it might have been for General Tire, as a broadcast licensee, to swallow, it is highly doubtful that it would be in the pickle that it is in now if there had been rules that: (1) governed the amount of time that stations could devote to a particular type or source of program; (2) limited the amount of time stations could devote to commercial advertising; (3) prohibited sales by stations of advertising time for other than monetary consideration and under terms spelled out in their rate cards. The Examiner would add that if such standards, properly drafted and intelligently implemented, breach the First Amendment or are outside the regulatory powers conferred upon the Federal Communications Commission by the Communications Act of 1934, he badly misreads the law, and has no feel for its development.

Accordingly, IT IS ORDERED that in the unlikely event an appeal to the Commission is not taken from this Initial Decision by any of the parties, or the Commission does not review the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of RKO General, Inc. for renewal of license of television broadcast station KHJ–TV, operating on Channel 9 in Los Angeles, California, is DENIED, and the application of Fidelity Television, Inc. for a construction permit for a new television broadcast station to operate on Channel 9 in Norwalk, California, is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
THOMAS H. DONAHUE, *Hearing Examiner.*

44 F.C.C. 2d

104-019—74——16

F.C.C. 73–1290

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re THE THOMS BROADCASTING CO., INC., ASHEVILLE, N.C. For Waiver of Section 76.501 of the Commission's Rules	CSR–350(X)

MEMORANDUM OPINION AND ORDER

(Adopted December 6, 1973; Released December 11, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID DISSENTING; COMMISSIONER WILEY ABSENT.

1. On April 18, 1973, Thoms Broadcasting Companies, Inc., parent of Thoms Cable TV, operator of a cable television system at Asheville, North Carolina, and parent of WISE–TV, Inc., licensee of WANC–TV, Asheville, North Carolina, filed a "Petition for Waiver of CATV–TV Divestiture" requesting a waiver of Section 76.501 of the Commission's Rules.[1] On May 23, 1973, Wometco Skyway Broadcasting Company, licensee of WLOS–TV, Asheville, North Carolina, filed a "Request for Imposition of Time Limitation in Response to Petition for Waiver of CATV–TV Divestiture." On June 7, 1973, Thoms answered Wometco's pleading by filing an "Opposition of the Thoms Broadcasting Companies, Inc., to the Request of Wometco Skyway Broadcasting Company to this Commission to Impose a Specific Time Limitation when Granting a Waiver of Section 76.501 of its Rules." On July 9, 1973, the Department of Justice filed an "Opposition of Department of Justice to Petition for a Waiver of Section 76.501 of the Commission's Rules." And on August 3, 1973, Thoms filed the "Reply of the Thoms Broadcasting Companies, Inc., to the Opposition of Department of Justice." The "Comments" of the National Citizens Committee for Broadcasting have been accepted as informal pleadings and have been considered herein.[2]

2. Thoms began cable television operations in Asheville, North Carolina, in October of 1968 and presently carries ten signals on a twenty channel system to 3280 subscribers out of a potential of 10,000. Asheville, North Carolina, has a population of 57,681 and is part of the Greenville-Spartanburg-Anderson, South Carolina, -Asheville, North Carolina, television market (#47). In addition to WANC–TV (Ind.), WLOS–TV (ABC) and WUNF–TV (Educ.) are also licensed to serve Asheville, North Carolina. Wometco, the licensee of WLOS–

[1] For the background which gave rise to the present proceeding, see Paras. 1–2, *Ft. Mason TV Improvement Co.*, FCC 73–1285, — FCC 2d —.
[2] *See* Note 2, *Ft. Mason TV Improvement Co., id.*

TV, also owns WLOS–FM, Asheville, North Carolina. WFBC–TV (NBC), Greenville, South Carolina, places a predicted Grade A contour over Asheville, and is owned by Multimedia, Inc., which also has an AM station in Asheville, WWNC, and which owns the city's daily newspaper. WSPA–TV, Spartanburg, South Carolina, also places a predicted Grade A contour over Asheville, and because Asheville is situated in a valley WSPA–TV also operates two translators in Asheville. Three other AM radio stations are licensed to the community.

3. Thoms principally argues that WANC–TV is unprofitable, partially supported by Thoms' other enterprises, and therefore unsaleable. Thoms, however, admits that both the cable television system and WANC–TV are currently profitless, and that it has applied to the city of Asheville for a cable television rate increase. Therefore, this is not a case where a waiver would enable a profitable cable television system to continue supporting an unprofitable UHF station in the same community. Indeed, absent the instant cross-relationship, petitioner might channel more of its resources and energies into making WANC–TV a viable UHF station. Furthermore, we feel that petitioner has failed to demonstrate that waiver would serve both the underlying objectives of Section 76.501 of the Rules and avoid unnecessary hardship. Specifically, Thoms has not shown the extent of financial loss it would suffer as a result of mandatory divestiture or the extent to which the television station is supported by its other enterprises, and has made no showing of a good faith effort to find a buyer. Moreover, Thoms has not shown the impact of the station-system cross-relationship upon economic competition and diversity of control of the media in Asheville, North Carolina.

In view of the foregoing, we do not find that the requested waiver would be in the public interest.

Accordingly, IT IS ORDERED, That the above captioned petition for waiver filed by Thoms Broadcasting Companies, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1246

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VALLEY CABLE VISION, INC., DERBY, CONN., ANSONIA, CONN., SEYMOUR, CONN. For Certificates of Compliance	CAC-115 (CT001) CAC-116 (CT002) CAC-119 (CT003)

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1973; Released December 7, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE, REID AND WILEY CONCURRING IN THE RESULT.

1. Valley Cable Vision, Inc. operates cable television systems at Derby, Ansonia, and Seymour, Connecticut, which are located in the Hartford-New Haven-New Britain-Waterbury television market (#19).[1] The systems provide their subscribers with the following television broadcast signals:

WHNB-TV (NBC, Channel 30), New Britain, Conn.
WTIC-TV (CBS, Channel 3), Hartford, Conn.
WHCT-TV (Ind., Channel 18), Hartford, Conn.
WEDH (Educ., Channel 24), Hartford, Conn.
WTNH-TV (ABC, Channel 8), New Haven, Conn.
WATR-TV (NBC, Channel 20), Waterbury, Conn.
WCBS-TV (CBS, Channel 2), New York, N.Y.
WNBC-TV (NBC, Channel 4), New York, N.Y.
WABC-TV (ABC, Channel 7), New York, N.Y.
WNEW-TV (Ind., Channel 5), New York, N.Y.
WOR-TV (Ind., Channel 9), New York, N.Y.
WPIX (Ind., Channel 11), New York, N.Y.
WNET (Educ., Channel 13), Newark, N.J.

On March 31, 1972, Valley Cable Vision filed applications for certificates of compliance requesting authorization to carry the following additional television signals:

WEDW (Educ., Channel 49), Bridgeport, Conn.
WXTV (Spanish language, Channel 41), Paterson, N.J.
WNJU-TV (Spanish language, Channel 47), Linden, N.J.
WNYC-TV (Noncommercial, Channel 31), New York, N.Y.

[1] Subscriber distribution for the Valley systems is as follows:
Derby, 1,147 subscribers of 12,070 population.
Ansonia, 1,079 subscribers of 21,119 population.
Seymour, 586 subscribers of 12,776 population.
The systems began operation in March, 1972 and have 24 channels available for carriage of broadcast and access services. Of these channels, thirteen are used for television signal carriage, five for automated and one for non-automated program origination.

The applications are opposed by Broadcast Plaza, Inc., licensee of Station WTIC–TV, and Connecticut Television, Inc., licensee of Station WHNB–TV. Valley Cable Vision has replied.

2. In their oppositions, both Broadcast Plaza and Connecticut Television argue that Valley Cable's franchises fail to comply with the franchise standards of Section 76.31 of the Commission's Rules. The Rules do not require systems which were operational prior to March 31, 1972 to show compliance with our franchise standards until the expiration of their current franchise or March 31, 1977, whichever occurs first. In any event, the Commission has held already that franchises granted by the State of Connecticut are in fact in substantial compliance with our franchise standards. *Valley Cable Vision, Inc.*, 38 FCC 2d 959, *reconsideration denied*, 40 FCC 2d 191 (1973). Broadcast Plaza, additionally, has filed a letter requesting that action be withheld on all Connecticut applications for certificates of compliance pending the outcome of a proceeding before the Connecticut Public Utilities Commission which could change the franchises. This request was denied in *Valley Cable Vision, Inc., supra.*[2]

3. Connecticut Television further alleges that Valley Cable's systems are not "grandfathered," that it commenced unlawful cable service in the three communities, and that such service should be terminated. In support of its contention, Connecticut Television states that on March 21, 1967, the Connecticut Public Utilities Commission, after extensive hearings, granted Eastern Cablevision Company predecessor in interest of Valley Cable Vision, certificates of public convenience and necessity (franchises) to operate cable television systems at Derby, Ansonia, and Seymour. On May 19, 1967, Eastern filed with the Commission a Section 74.1105 notification of proposed service.[3] This notification was unopposed, and eventually Valley Cable commenced operations. Prior to the filing of the notification, the Connecticut PUC's franchise grants were challenged in the Hartford County Superior Court. Connecticut Television alleges that under Connecticut law, the Connecticut PUC's actions were automatically stayed during the pendency of such appeals; thus the Section 74.1105 notification was premature since at the time it was filed it did not have valid franchises. We do not find Connecticut Television's argument persuasive. Connecticut Television was served with a copy of the Section 74.1105 notification in May, 1967, knew of the above-described events, and had ample opportunity to object and to invoke the mandatory stay provi-

[2] Connecticut Television, Inc., additionally argues that certificates of compliance should not be issued pending court action on the program origination requirement. This argument is mooted by the Court's decision in *United States* v. *Midwest Video Corporation*, 406 U.S. 649 (1972) affirming the Commission's authority to require origination.

[3] Former Section 74.1105(a) of the Rules provided, in part:

> (a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise. . . .

sion of Section 74.1105(c) of the Rules.[4] This it did not do. To allow Connecticut Television to object to the notification now, some six years later, would be inequitable. Compare *West Valley Cablevision, Inc.*, 19 FCC 2d 431 (1969), and *Greater Lawrence Community Antenna, Inc.*, 39 FCC 2d 935 (1973). To the extent that the appeal of the Connecticut PUC's initial franchise grant stayed the effectiveness of the franchise, the effect upon this Commission of such a stay is unclear. In any case, we note that the validity of the grants ultimately was upheld by the Connecticut Supreme Court. *Connecticut Television, Inc.*, v. *PUC*, 159 Conn. 317, 269 A. 2d 276 (1970). We believe it appropriate to accept the notification as timely filed.

4. Additionally, Connecticut Television incorporates into its opposition its "Petition for reconsideration" of the *Cable Television Report and Order*, 36 FCC 2d 141 (1972). In its petition, Connecticut Television argues that the Hartford-New Haven-New Britain-Waterbury television market requires special treatment *vis-a-vis* the Commission's signal carriage rules. In support of this argument, Connecticut Television states that the Commission has previously acknowledged the need for special treatment in this market by designating the market with an asterisk in its August 5, 1971, "Letter of Intent" to Congress. *Cable Television Proposals*, 31 FCC 2d 115 (1971). Connecticut Television states that the market receives a number of overlapping television signals which present an economic threat to the station. It complains that the carriage of any significantly viewed stations throughout a county is especially unfair because the State of Connecticut is divided into only eight large counties, and that because of the pattern of market overlap, non-market stations are often able to obtain a sufficient audience in a small portion of a county to meet the significantly viewed criteria.

5. The "Letter of Intent," to which Connecticut Television refers, represented our tentative conclusions at one stage in the development of our existing cable television regulatory program. In paragraph 113 of the *Cable Television Report and Order*, *supra*, at 187, we stated:

> In connection with our special relief provisions, we note that in our August letter we designated certain markets where it appeared that special treatment to restrict distant signal carriage might have to be considered. We are no longer singling out these cases because the inclusion of substantial exclusivity protection for syndicated programming limits the impact of cable on local television service and is a new factor that must be taken into account. We are leaving unusual situations to petition for special relief, but there must be substantial showing to warrant deviation from the "go, no-go" concept of the rules.

Connecticut Television has not submitted any substantive evidence to establish the likelihood of financial injury resulting from Valley Cable's proposed signal carriage. In fact, we note that while some other stations may earn greater revenues, WHNB–TV has been, and still is, operating profitably. Its allegations of future injury are at least specu-

[4] Former Section 74.1105(c) of the Rules provided, in part:
> (c) where a petition with respect to the proposed service is filed with the Commission . . . within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question at temporary relief pending further procedures; . . . where no petition . . . has been filed within thirty (30) days after notice, service may be commenced at any time thereafter. . . ."

lative. Thus, we have seen no indication that our signal carriage rules will work particular hardship in the State of Connecticut, and accordingly, we are not persuaded to depart from our avowed "go-no-go" policy. Compare *Fort Smith TV Cable Company*, 39 FCC 2d 573 (1973).

6. With the exception of Station WNYC–TV, Valley Cable's signal carriage proposal is entirely consistent with the Commission's Rules. Station WNYC–TV is not local to the cable communities within the meaning of Section 76.61(a) of the Rules, and thus if it is to be carried on these systems, it must be carried as a distant signal. WNYC–TV operates as a noncommercial station, is a member of the Public Broadcasting Service, and its non-PBS programming appears to be primarily of an educational nature. Thus, WNYC–TV closely approaches the status of a noncommercial educational station, carriage of which is permitted by Section 76.61(d) of the Rules. But WNYC–TV technically is not a noncommercial educational station because it is licensed to the City of New York Municipal Broadcasting System.[5] While WNYC–TV does not qualify as a noncommercial educational station under Section 73.621(b) of the Rules, we are of the opinion that to deny its carriage solely because of this technicality would serve no useful public purpose. Moreover, we note that no objection to carriage of WNYC–TV has been filed. Accordingly, we will authorize its carriage.

In view of the foregoing, the Commisison finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition to Withhold Certification" filed May 15, 1972, by Broadcast Plaza, Inc., IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Objections of Connecticut Television, Inc.," filed May 15, 1972, ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–115, 116, 119), filed by Valley Cable Vision, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[5] Section 73.621(b) of the Rules provides that municipalities are eligible for a noncommercial educational station only where the municipality has no independently constituted educational organization. This is not the case with New York City.

F.C.C. 73-1272

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
WESTERN UNION INTERNATIONAL, INC.
Proposed rates for leased channel service
between Honolulu and Hong Kong

MEMORANDUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 7, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) proposed revisions to its Tariff F.C.C. No. 4, filed on April 4, 1973 by Western Union International, Inc. (WUI) to establish a rate of $4,750 for leased channel service between Honolulu and Hong Kong; (b) petitions to suspend or reject this proposed filing made by RCA Global Communications, Inc. (RCA) and ITT World Communications Inc. (ITT) on May 7 and 22, 1973; (c) a reply from WUI addressed to the petitions of RCA and ITT; (d) a request dated August 10, 1973 from WUI for special permission to file revisions on less than statutory notice withdrawing the $4,750 rate and substituting a rate for 600-baud and 200-baud speed service from Honolulu to Hong Kong based on an alternate voice/data rate of $5,000 per month; and (e) an opposition to this request filed by ITT on August 14, 1973.

2. WUI's initial filing sought to establish a rate of $4,750 per month for alternate voice/data service and other rates for narrowband services based upon this $4,750 figure.[1] It is scheduled to become effective December 11, 1973.[2] The existing rate for this route is published by ITT at $7,100 per month. Pursuant to Section 61.38 of the Commission's Rules, WUI filed data purporting to justify the rate. However, WUI initially attempted to justify the rate on the basis of satellite-only costs because, it contended, there were no available circuits in the existing cable. By this method, WUI showed a revenue requirement of $4,895 per month.[3] The staff then reminded WUI that *Authorized User*, 4 F.C.C. 2d 421 (1966), required a compositing of the costs of both satellite and cable facilities.

This second justification showed WUI's revenue requirement to be $6,459 based on the aggregate cost of existing circuitry composited on a 50/50 basis. Finally, WUI submitted a third justification using a

[1] The rates for narrowband services, e.g., 600 and 200 baud, are determined by applying carrier proposed ratios to the basic AVD rate, e.g. 600 baud is 60% of AVD.
[2] Originally scheduled to become effective May 8, 1973 but postponed by WUI.
[3] Even if we were to agree with WUI's contention about using satellite-only costs, the rate then proposed would still be below the costs shown by WUI.

novel approach to arrive at a revenue requirement of $4,715. However, to achieve this cost level, WUI determined circuit costs on the basis of a relative use of five circuits in the recently authorized Transpac II cable for each circuit used in the older cables, and then composited such cost with satellite circuit costs.

3. Petitioners RCA and ITT objected to the WUI filing on two grounds: that the rate was 26% below the costs as calculated on existing circuitry and that the third justification is improper because it is based on speculative costs expected to be incurred in the future but necessarily uncertain for present ratemaking purposes. We agree that the third method is not a conventional approach but we do not think it necessarily is grounds for rejection of the filing. While we agree with petitioners that a proposed rate which is 26% below costs calculated on the usual basis raises questions of justness and reasonableness, cost of service is not the only criterion which is used to determine the reasonableness of a rate. This Commission has held it to be the benchmark, *Private Line case*, 34 F.C.C. 217 (1963) but a carrier can depart from this standard upon a persuasive showing regarding an alternative method of justifying a rate.

4. Pursuing this line of reasoning, WUI filed its request for special permission to withdraw the $4,750 rate and its derivatives and to substitute rates for 600- and 200-baud service based on a theoretical AVD rate of $5,000. WUI argued that this new rate would bring the Hong Kong rate more into line with the rates for leased channel services to comparable points in the Western Pacific, *e.g.*, Japan $4,750, the Philippines $4,750, Korea $4,940, and Thailand $5,375. It inferentially argues that an area-rate approach similar to that used for leased channel rates from the continental United States to Europe would be more sensible than a route-by-route approach.

5. It appears that the cost justification on a route-by-route approach for leased channels in the Pacific may not be the most effective one. The carriers themselves appear to believe that a change is necessary and it may be that rates based on the aggregate costs of facilities to comparable and related points, i.e., area ratemaking, would be the more sensible and appropriate approach for this service area. We too see merit in exploring this approach and other possible alternatives and will therefore initiate, by a subsequent document, a rulemaking proceeding that will seek data to enable appropriate patterns and rates to be arrived at for Pacific leased channels. In the meanwhile, however, pending a more definite resolution of the problem, we think that the public interest and purposes of the Act would best be served by following an interim policy of allowing proposed rates in conformity with an area pattern rather than an individual cost justification on a route-by-route basis. Such an approach is not novel and has been used in the past not only in the communication field but also in other areas of regulation. In fact, Pacific leased channel rates from the Mainland, from Hawaii, and from Guam tend toward such a pattern at present so that our approach herein can be said not to be a change in policy, but a recognition of an existing tendency which should ease the burden of the industry and the Commission with regard to cost justification of individual rates. We realize that our interim policy

requires articulation in more detail, and we will take such steps in that direction as may be necessary after opportunity for further consideration. We will grant the WUI request for special permission in order to bring the Hong Kong rate more in line with the rates to comparable points than it presently is. However, we shall require WUI to put an expiration date on the rate of one year from the release of this document. Our grant of special permission merely allows WUI to file the tariff and should not be construed as any finding direct or indirect as to its reasonableness. Further, we require that WUI may not claim additional revenue requirements in affording it a fair return because of any possible decline in the revenue from the service.

Accordingly, IT IS ORDERED, that Western Union International, Inc. IS GRANTED special permission to withdraw its proposed $4,750 rate for alternate/voice/data service between Honolulu and Hong Kong and those narrow band rates based on the $4,750 rate and to substitute, on not less than one day's notice, rates for 600-baud and 200-baud service based on an AVD rate of $5,000;

IT IS FURTHER ORDERED, that Western Union International, Inc. is required to attach an expiration date to its tariff filing which shall be one year from the release of this Order for the above rates;

IT IS FURTHER ORDERED, that the petitions to reject or suspend filed by RCA Global Communications, Inc. and ITT World Communications Inc. are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73R–401

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WWKY, INC., WINCHESTER, KY.	Docket No. 19748 File No. BPH–7319
DAVID H. GREENLEE, TRADING AS CLARK COMMUNICATIONS CO., WINCHESTER, KY. For Construction Permits	Docket No. 19749 File No. BPH–8146

MEMORADUM OPINION AND ORDER

(Adopted December 5, 1973; Released December 7, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive application of WWKY, Inc. (WWKY), and David H. Greenlee, tr/as Clark Communications Company (Greenlee), each requesting a construction permit for a new FM broadcast station in Winchester, Kentucky. The applications were designated for consolidated hearing by Commission Order, FCC 73–566, 38 FR 14881, published June 6, 1973. Before the Review Board is a motion to enlarge issues, filed June 21, 1973, by WWKY, seeking addition of availability and sufficiency of funds issues against Greenlee.[1]

2. WWKY requests an inquiry into Greenlee's reliance upon a proposed loan commitment from the Clark County National Bank of Winchester. This request is based on alleged deficiencies contained in a bank letter signed by William H. Hodgkin, executive vice president of the bank, and dated November 13, 1972. The letter issues credit to Greenlee "in the principal amount of $50,000," stating that a $30,000 loan "has been approved" at 8% interest, payable in equal monthly installments over seven years and secured by "all equipment purchased" by Greenlee and by a second mortgage on his home, and adding that another $20,000 "has been extended to provide for contingencies," also payable in equal monthly installments over seven years at 8%. WWKY alleges that this letter does not specify what broadcasting equipment will secure the initial $30,000 loan, or whether Greenlee and his wife are willing and able to provide a second mortgage as additional security for this amount, or what, if anything, will secure

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's comments, filed July 18, 1973; (b) opposition, filed July 20, 1973, by Greenlee; (c) reply, filed August 1, 1973, by WWKY; (d) letter, filed August 10, 1973, by Greenlee; (e) supplement to motion to enlarge issues, filed October 11, 1973, by WWKY; (f) opposition to supplement, filed October 19, 1973, by Greenlee; (g) Broadcast Bureau's comments on (e) and (f), filed October 25, 1973; and (h) reply to (f) and (g), filed November 1, 1973, by WWKY.

the additional $20,000 loan. Petitioner further asserts that Greenlee's financial position is extremely weak, alleging, *inter alia*, that he plans to lease rather than buy all but $3,300 worth of broadcasting equipment, and that his home is worth $23,000 at most and is subject to a first mortgage of $17,000. WWKY argues that an availability of funds issued should be added unless the terms of the letter are amplified, or Greenlee can demonstrate that the bank is aware of his limited means and is still willing to lend $50,000 without additional security.

3. WWKY also requests an inquiry to determine whether Greenlee has reasonably estimated his expenses and has sufficient funds to cover first year costs. Petitioner asserts that, even if Greenlee's loan is granted, his application understates first year principal and interest payments by approximately $4,000. Petitioner also maintains that Greenlee's proposed first year costs budget of $39,111 does not provide at all for thirteen necessary items of first year cost, including hearing costs, and does not adequately provide for six other necessary items. The affidavit of David E. Griffith, WWKY's vice president and general manager since 1967, is submitted in support of the latter claims. Griffith particularly questions Greenlee's salary proposal, which calls for $15,600 to be allocated among four full-time and two part-time employees. According to Griffith, "[i]t has been the experience of WWKY in this community" that a full-time non-managerial employee, such as an announcer or secretary, "costs a minimum of $90 per week. Considering payroll taxes and other items, the annual cost of a person with such a salary is approximately $5,200."

4. The Broadcast Bureau, in its comments, agrees with petitioner that an availability of funds issue should be added absent a clarification of the terms of the letter of credit and an indication of the security on both loans. The Bureau also agrees that Greenlee has misstated the potential net proceeds of the two loans. With regard to the requested costs issue, the Bureau asserts that while many of WWKY's allegations are based on speculation and second hand information, there are enough legitimate questions raised as to understated or omitted costs to warrant addition of an issue, unless Greenlee can show that his cost estimates are reasonable and that he has the funds to meet them.

5. In support of his opposition to the addition of an availability of funds issue, Greenlee attaches three documents. The first, a bank letter dated July 13, 1973, states that the bank is willing to accept as security the equipment valued at $3,300 currently owned by Greenlee, and a second mortgage on his home. The second, a letter from the Farmers Home Administration, expresses that agency's approval of a second mortgage on the Greenlee home, and the third, a statement by Greenlee and his wife, contains a promise to provide such security. Greenlee also asserts that he "has been advised that the bank will not require any other collateral for the existing $20,000 loan than that specified in the $30,000 loan." With respect to the costs issue, Greenlee specifically responds to each of WWKY's claims and attaches supporting documentation. Greenlee concedes that he miscalculated the potential net proceeds of his loan and underestimated some costs. Accord-

ingly, he submits a revised costs budget of $40,511 which reflects increased expenditures for several items, including interest and principal payments on the bank loan. However, with respect to salaries, he declares that, even if he becomes a licensee, he will continue to work at his present job, which will enable him and his wife to serve the new station without salary. Thus, the $15,600 will be distributed among four persons (three for budget purposes) and will yield $5,200 per full-time position, meeting WWKY's projection of an adequate wage in the area. As for hearing costs, Greenlee states that they "are a matter of speculation. All legal bills . . . will continue to be paid out of current income." Greenlee now estimates his total first year costs at $47,561, which leaves a surplus of $2,439.

6. In reply, WWKY asserts that this cushion is inadequate to cover certain costs still unprovided for in Greenlee's revised budget. Petitioner attacks Greenlee's failure to budget for hearing costs, claiming that this item alone will exhaust his cushion "many times over." Petitioner also charges that Greenlee's salary proposal is inadequate and unrealistic in light of his plan to retain another job, and questions his estimates for studio renovation, records, publicity, and telephone expense. WWKY also claims that Greenlee has still not shown that he has $50,000 in available funds, since his statement that the bank will not require additional security for the $20,000 loan is unsupported by documentation from the institution itself. Responding to the latter point, Greenlee submits a letter dated August 10 which apprises the Board of an amendment to his application tendered the same date. The amendment contains another bank letter, dated August 8, 1973, which states the bank's understanding that the same collateral which supports the $30,000 line of credit will also support the additional $20,000 loan.

7. WWKY's supplement to its motion to enlarge is based on testimony given by Greenlee, and exhibits submitted by him, at a hearing session held on October 2, 1973. According to WWKY, it was revealed on that occasion for the first time that Greenlee will be present at the new station only three hours daily Monday through Friday; that his wife will perform only non-managerial tasks; and that the salaried employees of the station will be expected to carry out the duties normally handled by a program director and sales manager. Thus, petitioner charges, it now appears that for the "lowest conceivable salary allowance for non-managerial level employees," [2] Greenlee proposes to hire a staff which will perform most of the management functions at the station. In petitioner's view, this casts further doubt on the reasonableness of Greenlee's salary estimates, and on the sufficiency of his funds. Moreover, according to WWKY, the information adduced at the hearing also raises a question as to whether a member of Greenlee's proposed staff will be available at all times to "man" the station's control board. Accordingly, petitioner now requests the addition of a staff adequacy issue.

---

[2] See paragraphs 3 and 5, *supra*.

8. In his opposition to this supplement, Greenlee responds to the request for a staffing issue by declaring that all staff members except his wife will take turns operating the control board, and that these persons, working a total of 155 hours per week, will be adequate to cover all 126 broadcast hours. In its comments, the Broadcast Bureau asserts that the charges respecting Greenlee's salary estimates are without foundation since WWKY has not submitted affidavits of individuals who can state of their own knowledge that Greenlee will be unable to hire staff members under the terms he has proposed. In the Bureau's view, the Griffith affidavit submitted with WWKY's original motion and relied on in its supplement "only relates to WWKY's employment experiences, which is not to say that [Greenlee] will have the same experience." The Bureau also maintains that WWKY's request for a staffing issue should be dismissed, since it is "totally inappropriate" to make such a request except in an original motion. Alternatively, the Bureau would have the request denied on its merits because Greenlee's proposed schedule for "manning" the station "does not appear to be unreasonable."

9. In its reply pleading, petitioner abandons its request for a staffing issue, but continues to press its claims on the salary question, declaring that the Bureau's position on that subject is "incorrect, factually and legally." The Griffith affidavit, petitioner asserts, is not just a recital of WWKY's employment experience; it is the "knowledgeable opinion and judgment of a veteran broadcaster" as to the prevailing salaries in the Winchester market. Moreover, petitioner states, similar experience has been given weight by the Review Board in such cases as *James B. Francis*, 41 FCC 2d 303, 27 RR 2d 1337 (1973), review denied FCC 73–1155, released November 19, 1973, and *Lafourche Valley Enterprises, Inc.*, 30 FCC 2d 539, 22 RR 2d 228 (1971). To meet the objections raised by the Bureau, however, WWKY submits another affidavit executed by Griffith which states, *inter alia*, his experience that a program director in the Winchester market costs $120 per week.

10. The Review Board will deny petitioner's request for an inquiry into the availability of the proposed bank loan. The questions raised by WWKY concerning the total amount of the loan and the nature and adequacy of its security have been satisfactorily answered in the documents submitted by Greenlee. These documents are contained in two amendments to Greenlee's application, submitted July 20 and August 10, 1973, respectively, and accepted without opposition (FCC 73M–943, released August 14, 1973; FCC 73M–994, released August 31, 1973). The arrangements are clear and acceptable to the bank; accordingly, no substantial question exists as to the availability of a full $50,000 in funds. See *Buffalo Broadcasting Co.*, 25 FCC 2d 505 (1970).

11. With regard to Greenlee's estimated costs, we believe that, with one important exception, he has adequately explained the basis for his cost projects, and in those instances where his estimates were low has revised them in order to provide for a reasonable level of ex-

penditure. Thus, WWKY's objections to the estimates for studio renovation, records, publicity and telephones reflect no more than an honest disagreement as to appropriate expenses; petitioner has not shown that the costs it projects are essential to the operation of a fledgling station. Similarly, we can accept Greenlee's failure to budget for legal expenses, since he proposes to meet them as they accrue from his outside income and, moreover, has a surplus of available funds from which to draw. In this regard, we note that petitioner provides no support for its allegation that these costs will exhaust Greenlee's cushion "many times over." See *WVOC, Inc.*, 32 FCC 2d 765, 23 RR 2d 371 (1971). The Board will, however, order a limited inquiry into Greenlee's salary proposal. We are of the view that it would neither be unreasonable nor unprecedented for the Greenlees to serve without pay at the proposed station. *Cf. Clarkston Broadcasters*, 20 FCC 2d 40, 17 RR 2d 655 (1969). Moreover, we are given no reason to doubt either Greenlee's good faith in proposing to work two jobs, or his ability to conduct the overall management of the station despite frequent absences during the week. *Cf. Martin Lake Broadcasting Company*, 23 FCC 2d 721, 19 RR 2d 277 (1970). However, Greenlee conceded at the hearing that, in order to operate in this manner, he will have to delegate to others much of the responsibility for high level decision making, including sales management and program direction. Although Greenlee's proposed salary levels are apparently adequate to hire non-managerial staff, he has not responded to WWKY's allegation, based on the experience of a broadcaster in the area, that they are substantially less than that needed to retain management level personnel in Winchester.[3] The hiring of an additional employee as program director at the figure projected as necessary by WWKY, or a substantial increase in the salaries of Greenlee's proposed staff, could exhaust his surplus funds. The Board agrees with petitioner that these circumstances raise substantial doubt as to Greenlee's salary proposal and that an appropriate issue is called for.

12. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed June 21, 1973, by WWKY, Inc., IS GRANTED to the extent indicted below, and IS DENIED in all other respects; and

13. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

> To determine, with respect to the application of David H. Greenlee, tr/as Clark Communications Company:
>
> (a) The basis of the applicant's proposed salary estimates, whether they are reasonable, and if not, whether the applicant has available sufficient additional funds to meet such costs; and

[3] Although this charge was first made in a supplementary pleading, it was based on new information developed at a hearing session held only two days before the supplement was filed. Accordingly, the pleading is timely and we will consider the information contained therein in reaching our decision.

(b) Whether in light of the facts so found, the applicant is financially qualified to construct and operate his proposed station for one year.

14. IT IS FURTHER ORDERED, That the burdens of proceeding with the introduction of evidence and proof pursuant to the issue specified herein SHALL BE on David H. Greenlee, tr/as Clark Communications Company.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*